IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. ——.

ZIANG SUNG WAN, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR CERTIORARI TO COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Ziang Sung Wan, a citizen of the Republic of China, respectfully submits this petition for a writ of certiorari to be addressed to the Court of Appeals of the District of Columbia to bring before this Honorable Court for its review the transcript of the record in the case of Ziang Sung Wan, Appellant, vs. the United States of America, No. 3807, No. 12 Special Calendar, whereby under date of May 7, 1923, the Court of Appeals of the District of Columbia af-

firmed a judgment of the Supreme Court of the District of Columbia adjudging petitioner guilty of murder in the first degree and sentencing him to death by hanging.

Having in view the provisions of Section 3 of Rule 37 of the Rules of Practice of this Honorable Court, petitioner submits the following summary and short statement of the matters necessarily involved in the proper presentation to this Honorable Tribunal of the single question of general character and importance upon which allowance of this petition depends.

Petitioner was indicted by a Grand Jury of the District of Columbia for the wilfull and premeditated murder of one Ben Sen Wu, on the twenty-ninth (29) day of January, 1919 (R., 5). To such indictment petitioner pleaded "not guilty," and of the crime charged here reiterates his entire innocence.

On the trial the prosecutor introduced and there was submitted to the jury under instructions of the trial judge evidence tending to prove that the offices of the Chinese Educational Mission were located in premises known as 2023 Kalorama Road, Northwest, Washington, D. C., and that certain officers of said Mission, including Ben Sen Wu, resided there; that on January 31st, 1919, a caller at the Mission, one Kang Li, getting no response to his ringing of the door bell, lifted a window sash, entered the house, and finding the place in disorder summoned a police officer, and found on further search three dead bodies, including that of Ben Sen Wu (R., p. 42); that on the preceding Wednesday, January 29th, defendant (your petitioner), who was the friend of all the officers of the Mission, and had recently been their guest, had been seen in the Mission House about seven o'clock in

the evening by Kang Li, and in response to inquiry by the latter, had stated that certain of the officers above referred to were not in the house, which was true; that Burlingame and Kelly of the District police force proceeded to New York on the night of January 31st, and about nine o'clock the next morning had found defendant at his home in New York City, in bed suffering with a certain chronic condition of ill health; that defendant was reading a newspaper account of the tragedy at the Mission House, expressed great sorrow at the death of Wu, who was one of his best friends, and at the suggestion of one of the detectives present to the effect that he was needed in Washington to help clear up the situation, defendant promptly agreed to return at once and arrived in Washington in the early evening of the same day (Saturday, Feb. 1, 1919) (R. p. 53); that on arrival with the detectives and Kang Li, he entered an automobile at the railroad station and drove to a building where he was met by Major Pullman, Chief of Police, and Inspector Grant, the Chief of the Detective Force, D. C., and was immediately questioned by them in the presence of Lieutenant Burlingame and Sergeant Kelly, other persons passing into and out of the room from time to time; this continued until about ten thirty or eleven o'clock, when defendant, who was not well, declined the suggestion of Major Pullman that he should go to a hospital, and was taken by the police to the Hotel Dewey, (R. p. 55) where he was kept under police surveillance throughout the following week, being visited and plied with questions almost continuously each day and often at night by both the Chief of Police, the Chief of Detectives and by others, but was not allowed to see or have conversation with his brother who had also come from

New York to Washington and was likewise detained by the police under surveillance in the same hotel, nor was he allowed to communicate with friends or acquaintances nor to seek advice of counsel, nor was any attempt made at any time by any of the officers or others to advise him of his privileges in such regard, but the policemen who were detailed to guard him were quartered in his room, ate meals with him and "had orders not to let any one else see" him (R., 71).

Inspector Grant testified that while at the Dewey Hotel on the following Thursday or Friday (February 6th or 7th), later fixed as Friday, the 7th, in the course of one of the several daily quizzes, defendant was being querried as to an attempt on the part of certain persons to procure the cashing of a bank check, and witness Grant asked defendant "who went to the bank," further saying, "That has nothing to do with the murder; tell me who went to the bank," and defendant replied, "If you get the man who went to the bank, you will get the murderer," to the admission in evidence of which question and answer counsel for defendant promptly objected and moved for its erasure from the record and to the denial of such motion was allowed an exception which was duly preserved of record (R., 72), whereupon Grant told defendant that he knew who was the man who went to the bank, that it was defendant's brother Van, and that Van himself had told witness so (R., 72); on the following Saturday (February 8th) the police took defendant to the scene of the murder, the Mission House (Rec., p. 59) about 7 or 8 o'clock p. m., in company with the Chief of Police, Inspector Grant, Lieutenant Burlingame and Sergeant Kelly; after taking him over the house and pointing out the blood stains, etc., the of-

ficers questioned the petitioner all night and until about 5:30 o'clock Sunday morning (R., p. 68). As illustrative of one method used the following is quoted from the record, p. 68:

> "In the room on the third floor early Sunday morning, when Kelly was pressing the defendant for an answer, the reason witness (Burlingame) stated to him, 'Why don't you answer, why don't you tell Mr. Kelly what he wants,' was because defendant had been asked several questions and he was in a rather embarrassing position; if he answered the question he would have to implicate himself and he refused to answer and witness said to him, 'Why don't you answer the question one way or the other or tell Mr. Kelly what he is asking you;' being asked if witness was not trying to force an answer out of him, witness replied, 'You might put it that way;' witness asked defendant, 'Why don't you answer? Answer Mr. Kelly's question.'"

Between ten and eleven o'clock that night, Major Pullman, in the presence of Grant, Burlingame and Kelly exhibited certain of petitioner's handwriting to him and then the stub in the check book of the Mission and they pressed him for an answer as to who wrote that (R., p. 61); Major Pullman said, "Tell me who wrote that;" petitioner finally said, "I think I wrote that," referring to the stub, and the Major said, "I don't want you to tell me what you think; you know whether you wrote it or not" (R., p. 61); when first asked if the stub was in his writing when the Major pressed him for an answer he said "no," looked at it for a while and said, "I think so," and when still further pressed, said he wrote it (R., p. 68). This testimony was admitted over objection and exception

to adverse ruling, duly preserved of record (R., p. 72).

Again on the following Sunday evening at the Mission House witness (Inspector Grant), appealed to the good side of defendant's nature and "asked him several times to tell witness the truth about this thing" and finally said to him, "If you are guilty and your brother is innocent, now is the time to tell it; I want to know," and again appealing "to the better side of his nature," told defendant "that things looked pretty black (or bad) for him," that developments showed "that he (defendant) knew more about the crime than he was telling," and "asked him to tell the truth," saying "the investigation so far looks pretty black for you; tell me the truth," and told him (defendant) a lot of things, but never offered any inducement, because witness (Grant) "has had too much experience in that line." "Q. And this was what you meant by saying that you appealed to the better side of his nature—by telling him that the investigation looked awfully black and that he had better tell you the truth? A. Yes; I thought if he told the truth about it, it would be the proper thing for him to do under the circumstances" (R., p. 73). At page 81 of the Record, referring to the same incident, Grant said he wanted to get some talk out of him which would fasten the crime on him, wanted to clear up the crime, told him, "we are all firmly of the belief that you know who killed those men," sat and watched him and looked at him carefully and for a long time after he would tell him those things and would say, "Now, you think it over," and stayed right there with him. "Q. Your purpose in telling him those things was to make him talk? A. My purpose was to get him to tell me the truth about this case. Q. Answer the ques-

tion, will you? A. Well, he had to talk;" told him "certain things," how far we had gone with the case, saying, "You know we have been at this thing a long time, Wan, and I am tired if you are not," said there were certain things that pointed directly to him, and told him, "if you did not kill these people, then I want you to tell me who did," told him "things look black for you, * * * If you are guilty and your brother is innocent, I want to know, for I am holding your brother, just the same as I am holding you." Witness thinks he said, "now is the time to tell me," intimating to him that he had been in confinement a long time and witness wanted to know something about it;" said to him, "things look bad for you," and "you ought to tell me the truth" (R., p. 82-3). Then it was that petitioner made the statement that he saw all three killed, but did not take any part in it; that a man named Chen had killed Wu, after Wu had killed Dr. Wong and Mr. Hsie (R., pp. 74, 83).

To the admisison of all of the above in evidence, counsel for the defendant strenuously objected on the ground that any statement made by the defendant under such circumstances was involuntary and inadmissible in evidence, and such objection having been overruled by the Court, exception to the Court's action was promptly taken and preserved of record (p. 74).

The following morning defendant was taken from the station house and again escorted to the Mission House, and, after petitioner had been forced and induced to involve himself, Burlingame said to him, "Wan, you know how this happened; you put a man by the name of Chen in it; I know there was no Chen; you are the man that you are placing here in the story as Chen"; that defendant thought a min-

ute and said there was no Chen in it (R., p. 62); Grant, however, says Burlingame said, "Tell us where Chen was," and Grant put his foot on Burlingame, looked defendant in the face and said, "there was no Chen here, was there? Tell me what you did" (R., p. 74). "You know there is no Chen in this; you are just putting Chen in your place; tell us now what you did;" he hung his head and Grant said, "Come on, Wan, now tell us," put his hand to his chin, patted him on the shoulder, and "He told us he had killed Wu after Wu had killed Wong and Hsie" (R., p. 83). During this time Detective Burlingame made notes and asked questions. To this testimony and the admission of same in evidence, counsel for defendant objected and moved that it be stricken out on the grounds above stated, and to the denial of such objections and motion, defendant was allowed an exception which was preserved of record (R., p. 74).

The next morning, that is, Tuesday, February the 11th, various questions were submitted to the defendant, mostly by Detective Burlingame, in the presence of a stenographer, who reported the interview stenographically. For purposes of this interview, the defendant was roused "out of the bed and sat on the side of the bed" (Detective Kelly, R., 98). This interview was "To get the statement in writing, as he had given the day before." (R. p. 63.)

The questions and answers constituting the so-called signed confession of the defendant which was admitted in evidence over the objection and exception thereto noted by the defendant is found on pages 99 to 110 and is not reproduced here at length because of the fact that same in original form is readily accessible in the printed transcript of the record and of peti-

tioner's desire not unnecessarily to extend the length of this petition.

Petitioner's objections to the admission in evidence against him in the course of the trial of the various statements of witnesses for the prosecution as above set forth and all objections thereto and exceptions to the rulings of the learned trial court as to the admissibility thereof were founded in law upon rules of evidence and trial procedure which should govern and control the admission of evidence against one accused and on trial in a Federal Court for a capital offense, defined and declared by this Honorable Court in its comprehensive and enlightening opinion in the case of Bram vs. United States, 168 U. S. 532, in which this Honorable Court held, at 542, that,

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

The opinion of this Court in the Bram case has never been departed from, even to the extent of modifying any one of the important principles therein expounded.

Although the opinion of this Court in the Bram case was repeatedly referred to and at great length quoted from in the course of argument on appeal before the learned Court of Appeals of the District of Columbia that learned tribunal seemingly thought it unnecessary to advert to petitioner's arguments based thereon, and in affirming the judgment of the Supreme Court of the District of Columbia, sentencing defendant to death by hanging, contented itself with pointing out the views

of other courts, as well as its own, as to the differences in definitions of "confessions," "admissions" from which guilt might be logically inferred, and "casual observations" which "an innocent bystander might logically have made," and referred to Bram vs. United States, 168 U. S. 532, only in passing and as approving the rule as to the admissibility of confessions stated in 3 Russell on Crimes (6th Ed) 478, as follows:

> "But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

and in its comment upon such rule as follows:

> "In all cases, however, the confession must have been induced by the excitation of hope or fear arising from an actual threat or promise made by a person in authority. Hardy vs. United States, 3 App. D. C. 35, 46. Or as concisely summarized in the Bram case 'it must necessarily have been the result of either hope or fear, or both, operating on the mind."[1] * * * The crucial test to be applied in determining whether or not a confession is voluntarily or involuntarily made, depends upon its truth or falsity. As was said by

[1] In passing it may be noted that the expression quoted from the Bram case, "It must necessarily have been the result of either hope or fear, or both, operating on the mind" when examined in its context appears to be the conclusion of this Court from the specific facts of the Bram case and not as might be inferred from the language of the learned Court of Appeals, a statement of a general principle. See Bram vs. U. S. 168 U. S. 532 at 562.

the court in Commonwealth vs. Dillon, 4 Dall. 115, 117: 'If such declarations are voluntarily made, all the world will agree, that they furnish the strongest evidence of imputed guilt. The hope of mercy actuates almost every criminal who confesses his crime; and merely that he cherishes the hope is no reason, in morality, nor in law, to disbelieve him. The true point for consideration, therefore, is whether the prisoner has falsely declared himself guilty of a capital offense? If there is ground even to suspect, that he has done so, God forbid, that his life should be the sacrifice.' "

"Applying this rule, the present confession accords with every reasonable theory of guilt. All the circumstances in the case corroborate it. Therefore, its admissibility, as competent evidence for the consideration of the jury, is supported by every principle of law. Certainly the evidence tending to show that it was involuntarily made was not so conclusive as to justify the court in excluding the confession from the jury. It was submitted properly, as an issue in the case, and the jury found that it was voluntarily made. This conclusion is amply supported by the evidence in the case."

There were no eye witnesses to the crime of which your petitioner has been convicted and the evidence against him aside from the confessions heretofore referred to is purely circumstantial.

Petitioner respectfully represents that in standing trial for the alleged commission of a capital offense, of which he is innocent in fact, he is guaranteed by the fundamental law of the land a fair and impartial trial and is subject to be convicted, if unhappily such should be his fate, only after having been accorded "due process" of law in its application according to principles and formulae enunciated by courts of con-

trolling influence, that is, in the instant case, as enunciated by this Honorable Court in the course of its opinion in the case of Bram vs. United States, above cited.

That this case is of importance is demonstrated by the fact that in and by the judgment complained of and to be brought under review, human life has been declared as forfeit. That its correct decision is of great and widespread public interest, and essential to the certain and general administration of justice in Courts of the United States is sufficiently and plainly apparent from the statement made and the failure on part of the final appellate tribunal, sitting in the District of Columbia to accept as binding authority the opposite pronouncements of this, the tribunal of final appeal in matters of Federal cognizance, sitting in all these United States.

Again, in the interest of uniformity and clarity of decision in matters of such prime importance as the admission of evidence tending to conviction in capital cases in Courts of the United States, it is respectfully submitted that this petition for certiorari should be granted.

ZIANG SUNG WAN,
Petitioner.

DISTRICT OF COLUMBIA, ss:

I, ZIANG SUNG WAN, being first duly sworn on the Evangels of Almighty God, do say that I have read the foregoing petition of certiorari and know well the contents thereof, and on my oath do say that the statements of facts therein contained having to do with any supposed connection on my part with the crime charged are true.

....., Sworn to and subscribed before the this —— day of July A. D. 1923.

....., *Notary Public.*

BRIEF IN SUPPORT OF PETITION.

The most important question in this case before the Court of Appeals of the District of Columbia, and the only question before this Honorable Court is as to the admissibility in evidence of various statements made by petitioner which were admitted over his objection in the trial, exceptions being duly noted and error assigned on the ground that they were each and all confessions shown by Government's witness to be involuntarily made. These statements will be discussed in the order in which they appear in the record under two general heads,—*First*, were they "confessions," and *Second* were they voluntarily made?

I. *Petitioner's Statements Were "Confessions."*

The opinion of the learned Court of Appeals in sustaining the ruling of the trial court in admitting the statements in question raises *in limine* the fundamental issue, what is a "confession"? Is an exculpatory statement or any statement not intended as a direct admission of guilt a confession and therefore to be excluded unless voluntarily made? The Government strenuously contended in the Court of Appeals for the negative of this proposition; that is to say, that only a direct admission of guilt is a confession, and the Court of Appeals sustained this contention.

(1) *Statement Friday, February 7th, at the Dewey Hotel "who is the man who went to the bank; who is the murderer."*

The first statement raising this issue was made on Friday afternoon, February 7th, after the defendant, ill, *incommunicado*, "in a foreign land" (to use the

language of this Honorable Court in the Bram case, Bram v. U. S., 168 U. S., at p. 563) had withstood long continued, pertinacious and harassing examinations by the police officials for an entire week. Then, in the course of one of these examinations, the following took place as stated by the learned Court of Appeals in its opinion:

> "An officer testified that while defendant was at the hotel he was being questioned by the witness respecting the taking of the check to the bank. The officer asked him who went to the bank, suggesting 'that has nothing to do with the murder, tell me who went to the bank;' and the defendant said 'Mr. Grant, after what you said, who is the man who went to the bank; who is the murderer?'"

This statement was admitted over defendant's motion to strike and exception duly noted, on the ground that it was not shown to have been voluntarily made. The learned Court of Appeals held that there was no merit in the defendant's assignment of error, not on the ground that the statement was in truth voluntary, but on the ground that it was not a "confession." The opinion of he Court of Appeals on this point reads as follows:

> "Counsel seems to have regarded the statement as a confession. It was not even an admission of defendant's connection with the transaction. It was a mere casual observation which an innocent bystander might logically have made. At the stage of the investigation when the statement was made, it had no more significance, coming from guilty lips, than if it had been innocently uttered. It only became a significant circumstance, when in his confession defendant subsequently admitted that he

> and his brother took the check to the bank, and his further statement in the confession that the forgery of the check was directly associated with the commission of the murder."

It is submitted with all deference that this is not the law as laid down by this Honorable Court. From the point of view of the detective to whom this statement was made, who knew that petitioner's brother had gone to the bank and doubtless believed that petitioner had accompanied him, petitioner himself was "the man who went to the bank," and the statement was offered by the Government to prove out of petitioner's own mouth that he was the murderer. From the point of view of the petitioner on the other hand, the statement may be regarded as exculpatory as tending to shift suspicion from himself to "the man who went to the bank." The petitioner had at that time not admitted that he went to the bank. Petitioner afterwards in the course of further confessions, the admissibility of which is also disputed, admitted having gone to the bank, but he repudiated this admission along with the rest of the confessions and testified at his trial that he did not go to the bank. But whether petitioner's statement was on its face incriminatory or exculpatory, in either case it might in the light of all the circumstances tend to implicate him in the commission of the crime charged, and on that theory was offered in evidence by the Government and admitted by the Court over petitioner's objection, and it is now too late to justify its admission as "a casual observation."

In the Bram case this Court, dealing with statements on their face exculpatory, but offered "because of an implication of guilt" (168 U. S. at 562) namely, a

statement made by Bram that one Brown "could not have seen me; where was he?" and again, the statement, "well I think and many others on board the ship think that Brown is the murderer," held these statements to be confessions and subject to the rules of exclusion applying thereto. The opinion of the Court on this point, handed down by the late Chief Justice White, then Associate Justice, is as follows:

> "The principle on the subject is thus stated in a note to section 219 of Greenleaf on Evidence: 'The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess. Rev v. Tyler, 1 C. & P. 129; Rex. v. Enoch, 5 C. & P. 539. See further as to the object of the rule, Rex v. Court, 7 C. & P. 486 per Littledale, J.; People v. Ward, 15 Wend. 231.' Nor from the fact that in Wilson v. United States, 162 U. S. 613, mention was made of the circumstance that the statement of the accused was a mere denial of guilt accompanied with exculpatory explanations, does the decision in that case conflict with the principle we have just stated. The ruling there made that error to the prejudice of the accused did not arise from the admission of the statement there considered, was based not alone upon the nature of the statement but upon 'the evidence of its voluntary character; the absence of any threat, compulsion or inducement; or assertion or indication of fear; or even of such influence as the administration of an oath has been supposed to exert.' (p. 624).
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> "The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then after procuring its admission claiming that it did not tend to prove guilt, and could not, therefore, have

been prejudicial, has been well stated by the Supreme Court of North Carolina, State v. Rorie, (1876) 74 N. C. 148:

"'But the State says this was a denial of guilt and not a confession. It was a declaration which the State used to procure a conviction; and it is not for the State to say that the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precluded the State from saying that it was not used to his prejudice.' (p. 150)" (Bram v. United States 168 U. S. 532 at 541, 542.)

(2) *Alleged statement Saturday night February 8th, at the Mission House, that petitioner wrote the $5,000.00 check stub.*

The next day, Saturday, February the 8th, the police officers took the petitioner to the Mission House where the murder had been committed and kept him up all night, going over the details of the crime as they had worked them out and ceaselessly questioning him in relays from 7:30 p. m., to 5:00 a. m. During the course of this questioning, petitioner, according to the testimony of the officers, admitted that the entry on the check stub in the check book of the Educational Missin "T. T. Wong, $5,000" was in his hand-writing. Petitioner on the stand denied making this statement, saying that he merely said it looked like his handwriting. The admission of this statement was assigned as error but the Court of Appeals holds:

"As to the alleged admission respecting the hand-writing, it does not come within the category of a confession, since it is admitted by the defendant in a signed confession, testified to by the offi-

cers and denied by defendant on the witness stand. Hence it is reduced to a mere fact or piece of competent evidence upon which there was a conflict in the testimony, and which was properly submitted to the jury for its consideration."

In passing, it is earnestly submitted that if this statement was inadmissible as a matter of law as a confession involuntarily made, it could not have become admissible because the defendant later denied making it; (West v. U. S., 20 App. D. C., 347, at p. 352). But the present point is that the Court of Appeals holds it admissible because it was not a confession, for the learned Court proceeds:

> "The term confession has no application to a mere admission or statement of an independent fact from which guilt may be inferred; or even to incriminating acts. State vs. Campbell, 73 Kans. 688; Rusher v. State, 94 Ga. 363. In other words, an admission not of guilt, but tending merely, in connection with other facts, to establish guilt, does not amount to a confession. McGehee vs. State, 171 Ala. 19, 21; People vs. Jan John, 144 Cal. 284; State v. Willis, 71 Conn. 293; 2 Wigmore on Evidence, sec. 1050."
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> "A confession is a declaration made by a person charged with crime acknowledging his participation in its commission."

It is submitted with all deference that here again is a plain departure from the rule in the Bram case which excludes "not only direct confessions but any other declaration tending to implicate the prisoner in the crime charged." Certainly if the petitioner said that he wrote the entry on the check stub this had some tendency to implicate him in the crime charged and it was admitted on this theory. The weight of the evi-

dence is immaterial. As this Honorable Court said in the Bram case:

> "It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, and this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt."

(3) *Satement Sunday February 9th at the Precinct Station that Petitioner was present at the scene of the crime and saw one Chen kill the other men.*

The assignment of error in regard to the admission of this vitally incriminating statement is not specifically dealt with by the learned Court of Appeals in the course of its opinion. The Government in its brief argued that it was not a confession, but "at most only an admission against interest" relying on 2 Wigmore Evidence, Section 1051. The learned author in that section of his work as well as in Section 821 with which it is cross-referenced does indeed support the proposition for which he is cited, but after stating with

approval the doctrine contended for by the Government, the latter section proceeds to show that it is not the law in the Federal Courts. Professor Wigmore says:

> "In the Federal Supreme Court this doctrine is ignored: 1896 Wilson vs. U. S., 162 U. S. 613, 621, 16 Sup. 895 (here exculpatory assertions were admitted, yet after a discussion of the principles of confession): 1896 Bram vs. U. S., 168 Id. 532, 18 Sup. 183 (a statement in which the defendant exculpated himself by asserting that a witness B. could not have seen the defendant do the act, and that he thought the witness B. did it, excluded as a confession; this Bram case, in this as in other respects, reached the height of absurdity in misapplication of the law)." (Section 821 footnote.)

It is respectfully submitted that the Government's authority proves too much.

Exercising the freedom from constraint and from control which commentators on judicial decisions enjoy but which is denied to inferior courts in our system of jurisprudence, Professor Wigmore hesitates not at all to stamp his lively disapproval upon the views expressed *arguendo* and the conclusions announced by this august tribunal in the opinion in the Bram Case, saying as above quoted, "this Bram case, in this as in other respects, reached the height of absurdity in misapplication of the law."

The learned Court of Appeals, restrained by its sense of judicial propriety, has refrained from criticism or comment, but none the less it would seem in silence to have disregarded, not to say ignored, the authoritatively declared principles of law upon which petitioner relied for his defense against illegal con-

viction. That the principles of decision in Bram's case were both pertinent and applicable in the highest degree to the facts of the instant case cannot be denied or even gainsaid.

If those principles in fact reach heights of "absurdity in misapplication of the law," which we deny, courts throughout the United States should be so advised, and that can be done authoritatively only by this Court itself.

If those principles are and remain the just expression of the best thought and judgment of this Court, of final earthly resort, then the petitioner and his trial counsel charged with his defense in matters of law, were and still yet are entitled to rely upon them, and both the trial and appellate courts should have yielded ready submission to their existing expression.

Anything less than this would be to substitute untrammeled individual view for controlling judicial precedent. and to effect conviction of one charged with a capital offense otherwise than in accordance with law. In such a scheme of things, passion and prejudice would run unrestrained and the Constitutional provision in favor of liberty and life and the prohibition against self-incrimination and being compelled to give evidence against one's self would degenerate into an empty phrase.

> (4) *Oral statement of petitioner Monday, February 10th at the Mission House.*
> (5) *Written statement of petitioner dictated Tuesday, February 11th, signed Wednesday, February 12th.*

It is conceded that these two statements are confessions and therefore their admissibility depends upon whether they were voluntarily made.

It is respectfully submitted that the opinions and judgments of this Honorable Court in United States vs. Wilson, 162 U. S. 613, and United States vs. Bram, 168 U. S. 532, conclusively establish that petitioner's statements and alleged statements were confessions under the federal rule, and that the decision of the learned Court of Appeals of the District of Columbia in the instant case squarely and openly departs from the rule established by this Honorable Tribunal.

II. *Petitioner's Confessions Were Not Voluntary.*

In considering this question as to each and all of the several confessions made, the Court is respectfully requested to consider *first*, the petitioner's situation as disclosed in the barest outline in the statement of facts set forth in the petition and this brief and abundantly shown by the record, and *second*, the specific representations from time to time made to the petitioner by the police officers. It is submitted that in the light of the general situation and the remorseless and accusatory questioning of the police officers, each and every one of the confessions made is inadmissible under the doctrine of the Bram case, quite irrespective of any specific promise or threat held out to petitioner by the police officers. Petitioner's situation: sick, alone, a stranger in a strange land, held *incommunicado* and ceaselessly accused and questioned, compelled him to talk and in and of itself rendered any and every confession which he made involuntary.

(A) *Petitioner's General Situation Rendered His Confessions Involuntary.*

1. *Petitioner Was Not a Free Agent.*

In the Bram case (at p. 561), this Honorable Tribunal states the general situation of the defendant as follows:

> "Before analyzing the statement of the police detective as to what took place between himself and the accused it is necessary to recall the exact situation. The crime had been committed on the high seas. Brown, immediately after the homicide, had been arrested by the crew in consequence of suspicion aroused against him, and had been by them placed in irons. As the vessel came in sight of land, and was approaching Halifax, the suspicions of the crew having been also directed to Bram, he was arrested by them and placed in irons. On reaching port, these two suspected persons were delivered to the custody of the police authorities of Halifax and were there held in confinement awaiting the action of the United States consul, which was to determine whether the suspicions which had caused the arrest justified the sending of one or both of the prisoners into the United States for formal charge and trial. Before this examination had taken place the police detective caused Bram to be brought from jail to his private office, and when there alone with the detective *he was stripped of his clothing,* and either whilst the detective was in the act of so stripping him, or after he was denuded, the conversation offered as a confession took place. The detective repeats what he said to the prisoner, whom he had thus stripped, as follows:"

and again, on page 563:

> "And these self-evident deductions are greatly strengthened by considering the place where the

statements were made and the conduct of the detective towards the accused. Bram had been brought from confinement to the office of the detective, and there, when alone with him, in a foreign land, while he was in the act of being stripped or had been stripped of his clothing, was interrogated by the officer, who was thus, while putting the questions and receiving answers thereto, exercising complete authority and control over the person he was interrogating. Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who in law could be considered a free agent."

If Bram were not a free agent under the above circumstances, can there be any doubt that the petitioner was not a free agent, situated as he was? Bram, as far as is disclosed by the record, was a well man, examined for a few moments alone by a police officer "in a foreign land" to be sure, for it was at Halifax, but among people enjoying the same "language, institutions and laws." Petitioner is of an alien race as well as foreign nationality and English is to him a foreign tongue with which at that time he was only imperfectly acquainted (R., p. 86). Can the mere fact that Bram was for a few moments stripped of his clothing (the only circumstance of hardship in his case which is not found in the instant case) outweigh in its moral effect petitioner's detention by the police, for more than ten days and nights, always under the immediate surveillance of a police officer in uniform, eating and sleeping when permitted to sleep only in such presence, sub-

jected to repeated questionings and accusatory suggestions by the higher police officials, suffering always with a chronic illness, and the weakness resulting therefrom, which, according to Dr. James A. Gannon of the Hospital Staff of the Jail, induced "great fatigue plus great pain," so that the petitioner was so exhausted that "he would really do anything to have the torture stopped" (R., pp. 147, 148).

(2) *Petitioner "Had to Talk."*

Another vital element in petitioner's general situation was the ceaseless accusatory questioning infinitely greater in degree than that in the Bram case which it is submitted in accordance with the rule laid down in the Bram case renders inadmissible all the confessions obtained in this case. Inspector Grant testified:

> "I wanted to straighten out a great many circumstances which pointed to him"; witness being asked if he wanted to get some talk out of him which would fasten the crime on him, answers: "I wanted to clear up this crime, yes, sir"; * * * wanted to know from him whether he was guilty. Wanted him to tell the truth; * * * witness said, "We are all firmly of the belief that you know who killed those men"; sat and watched him and looked at him carefully and for a long time after I would tell him those things and would say, "Now, you think it over," and stayed right there with him.
>
> "Q. Your purpose in telling him those things was to make him talk?
>
> "A. My purpose was to get him to tell me the truth about this case.
>
> "Q. Answer the question, will you?
>
> "A. Well he had to talk." (R. 81-82.)

For a similar illustrative extract from the record showing the compulsion to which petitioner was subjected, see Petition, *ante*, p. 5.

The corresponding facts in the Bram case are stated in the opinion of this Honorable Court:

> "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'" (p. 562.)

And this Court comments thereon as follows:

> "• • • But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrows any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.
>
> "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it can-

not be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how in reason can it be said that the answer which he gave and which was required by the situation was wholly voluntary and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. Indeed, the implication of guilt resulting from silence has been considered by some state courts of last resort, in decided cases, to which we have already made reference, as so cogent that they have held that where a person is accused of guilt, under circumstances which call upon him to make denial, the fact of his silence is competent evidence as tending to establish guilt. Whilst it must not be considered that by referring to these authorities we approve them, it is yet manifest that if learned judges have deduced the conclusion that silence is so weighty as to create an inference of guilt, it cannot, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime, would not be impelled to say something, when informed by one in authority that a co-suspect had declared that he had seen the person to whom the officer was addressing himself, commit the offence, when otherwise he might have remained silent but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him, or of hope that if he did reply he would be benefited thereby" (pp. 562-3).

Like Bram, but in a much greater degree than Bram, petitioner "had to talk." It was not "left to the

prisoner a matter of perfect indifference whether he should open his mouth or not" (Reg. v. Baldry 1852, 2 Den. C. C. 430 at 442 quoted with approval in United States vs. Bram, 168 U. S. 532 at 554), and it is respectfully submitted that to conclude that the confessions which were thus extracted from him "were wholly voluntary and in no manner influenced by the force of hope or fear" would, in the language of this Honorable Court in the Bram Case "be to deny the necessary relation of cause and effect" (168 U. S. 563).

3. These general considerations apply to all the confessions.

If it be suggested, as in the Government's brief below, that even if the earlier confessions were excluded as involuntary, still the written confession signed on February 12th was voluntary and sufficient to convict, it is submitted that the answer is two fold: First, there was one general situation existing with a cumulative effect; and second, it is impossible to tell the weight attached by the jury to the various confessions.

First, during the six days of questioning ending Thursday, February 6th, petitioner had withstood all efforts to force a confession as to a crime of which he repeatedly maintained his innocence; on Friday, February 7th, the first confession, in regard to the man who went to the bank, was obtained in the manner already outlined; this was used as a wedge the following night, Saturday, February 8th, at the Mission House, to drag from the ill petitioner in the course of the all-night coercion, the alleged confession in regard to the handwriting on the check stub (R., pp. 89-90); the next evening, Sunday, February 9th, in his cell at the Precinct Station, responding to the threats, inducements and promises of Grant, and real-

izing therefrom and from the unremitting efforts of the police for the past eight days, the hopelessness of surcease unless he implicated himself, he confessed, in direct response to Grant's specific statements, that he was present at the killing, and even then, fighting still to obtain a way out, said Chen did it; the next morning, Monday, February 10th, having again been taken to the Mission House, still confronted with questioning officers, accused point blank of having put Chen in his own place, and thus impelled by the inference of guilt resulting from silence referred to in the Bram case to make a further statement, the influence of the previous days being thus continued, pushing him back from point to point, wholly and indisputably against his own volition, and being already involved by the confession obtained on Sunday, he confessed that he killed Wu, and explained in answer to questions how it was done based upon the suggestions of the officers and the continuous "rehashing" of the case. The full confession, which the police had determined to extort from him had then and in such manner been obtained, and the next morning, Tuesday, the 11th, at the police station, it was merely reduced to question and answer form, stenographically recorded, "as he had given it the day before" (R., p. 63); on Wednesday, Feb. 12th, at the jail, the defendant not being well enough to read it, the confession was read to him, and he said it was "practically his story" (R., p. 63), and signed it. The next day Dr. Gannon found him worn and emaciated in his cell, and ordered him removed to the Red Cross room. It is clear that the last two steps of this continuous campaign, that is, the reducing to writing and signing, were not necessary for the purposes of the police, and were resorted to merely

to facilitate the proof on the trial. It is equally clear that all the confessions were the result of the efforts and suggestions of the police officials. Their influence was never removed, and in the nature of things the longer it continued the weaker the resistance became until at the end the petitioner was helpless. There can be no question, as a matter of law, that when once an improper influence has been exerted with the view and for the purpose of inducing or extorting a confession it must be shown to have been removed before any subsequent confession may be said to be voluntary.

Second, all the separate confessions having been offered before the jury as material evidence to secure a conviction, and being admissible only on that theory, if any one of them was involuntary, prejudicial error resulted from its admission. To illustrate this, the jury were entitled to believe the statement of petitioner made on the witness stand where (R., p. 142), in reply to the court's suggestion before the jury that he had so signed his death warrant, that he had signed it not because it was true but because he would let them, the police, go ahead and find out if it was true, indicating his belief that the statements in the confession had to be proved to be true by independent evidence; thus the jury on this one ground may have disregarded the written confession, even if it could by any possibility be said to be voluntary, and on the further ground that it was contradicted in various respects by the physical facts in the record; yet they had the right to convict him because of any one, or more, of the oral confessions. On what evidence the jury based its conviction, no one can say.

(B) *Specific Statements Implying Threats or Promises were made to Petitioner by Persons in Authority.*

It is now desired to direct the attention of this Tribunal to certain considerations growing out of specific statements made to petitioner on the all-important occasion in the police station late Sunday afternoon after petitioner had been charged with murder. This is the occasion as to which Inspector Grant was able, particularly on his cross-examination, to throw the most light upon the methods by which the prisoner's confession was obtained. Being asked similar questions in regard to another occasion, he responded, "It is one of the hardest things for me to do, to remember these conversations" (R., p. 76). On the occasion in question, Inspector Grant testifies that he saw the petitioner about 6 or 7 o'clock in the evening, this being the day after the all-night questioning at the Mission House. Grant, Burlingame and Kelly, all detectives, and a Chinese named K. S. Wang were there, and "there is where this man said that he wanted to tell his story and he told me about seeing all three of these men killed" (R., p. 72). "Sunday evening at the Mission House witness was appealing to the good side of his nature; asked him several times to tell the witness the truth about this thing; finally said to him, 'If you are guilty and your brother is innocent, now is the time to tell it; I want to know;' then it was he admitted seeing all three men killed; his brother was then in a cell in the back part of the building. • • • Appealed to the better side of his nature; 'told him that things looked pretty black for him,' that we had talked this thing over and the developments showed me that he knew more about the crime than he was telling, and I asked him for the truth;' told him

'the investigation so far looks pretty black for you; tell me the truth; * * * went over practically and rehashed all the case as far as they had learned about it and related all the circumstances against him; told him a lot of things, but never offered any inducement, because witness had too much experience in that line.' Q. And this was what you meant by saying that you appealed to the better side of his nature—by telling him that the investigation looked awfully black and *that he had better tell you the truth?* A. Yes; I thought if he told the truth about it, it would be the proper thing for him to do under the circumstances' " (73).

In support of the general proposition that these appeals to the petitioner's better nature, under the circumstances, rendered the petitioner's confessions thereby obtained inadmissible, the following passage of this Honorable Tribunal in its decision in the Bram case is invoked:

> "What further was said by the detective? 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere

abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to be removed by speaking naturally imported a suggestion of some benefit as to the crime and its punishment as arising from making a statement" (pp. 564-5).

But without resorting to these general considerations, it is submitted that the language above quoted includes at least two specific statements, one of which renders the resulting confession inadmissible under almost all the authorities and the other renders it inadmissible according to the holdings of most courts, including this Honorable Tribunal.

Reference is made first to the statement:

> "If you are guilty and your brother is innocent, now is the time to tell it. I want to know."

Short of an absolute and direct promise or threat, how could a promise or a threat by a person in authority be more clearly implied than by this statement under the circumstances in which it was made. The other is Inspector Grant's admission under cross-examination that he told Petitioner he had better tell the truth:

> "And this is what you meant by saying • • • that he *had better tell you the truth?*"
>
> "Yes, I thought if he told the truth about it it would be the proper thing for him to do under the circumstances."

The Government contends in its brief below (p. 32) that the record does not show that Grant said that it was "better" for petitioner to tell the truth; merely

that he told him "to tell the truth." But it is submitted that Inspector Grant's examination and cross-examination on this point taken in their entirety show that both technically and substantially Grant admitted that he told petitioner that it was "better to tell the truth." The Government's brief inveighs against the supposed "talismanic effect" (p. 19) of these words, and submits, "in the face of authority" (p. 19) that they are insufficient to exclude the confession which follows. The Government frankly admits, however, that

> "apparently this Court (i. e. the Court of Appeals of the District of Columbia) in West vs. United States, 20. App. D. C., has held that these words alone were sufficient to render a confession inadmissible."

Not only is this admission fully borne out by the West case, but it is further true that the Court of Appeals, in the West case, reluctantly yielded the view which it had previously expressed in Hardy vs. United States, 3 App. D. C., 35, decided in 1893 (where it held that the promise, "we would see what we could do for him" did not render a confession involuntary), because, as it frankly said, it was "constrained by the authority of the Supreme Court of the United States in the case of Bram vs. The United States" (West vs. U. S., 20 App. D. C., 347, at 351).

The pertinent passage of the opinion of the Court of Appeals in the West case reads in full as follows:

> "We are constrained by the authority of the Supreme Court of the United States in the case of *Bram vs. United States*, 168 U. S., 532, to hold that the confession here was involuntary, and

should not have been admitted in evidence. In various cases therein cited with approval and sustained by the majority of the court as stating the correct doctrine on the subject, the words used by the officers of the law to the prisoners in their custody to superinduce a confession were almost identical with those employed in this case. In *Rex vs. Griffin*, Russ. & Ryl. 151, they were, 'It will be better for you to confess,' in *Rex vs. Kingston*, 4 Car. & P. 387, 'You are under suspicion and you had better tell all you know;' in *Rex vs. Garner*, 1 Dec. C. C., 329, 'It will be better for you to speak out;' in *People vs. Barrie*, 49 Cal., 342, 'It will be better for you to make a full disclosure;' in *People vs. Wolcott*, 51 Mich., 612, 'It will be better for you to confess;' in *Commonwealth vs. Myers*, 160 Mass., 530, 'You had better tell the truth;' in *Vaughan vs. Commonwealth*, 17 Gratt., 575, 'You had as well tell all about it.' Some of these words of exhortation to a confession would seem to have been innocent enough; and yet they were each and all of them held sufficient to vitiate the confessions made in pursuance of them, and to relegate such confessions to the category of confessions involuntary in law. And if these words of inducement were objectionable, assuredly those of the present case are no less so. They are of the same precise tenor and effect."

Yet, in the instant case, although the point was elaborately argued in defendant's brief, the Court of Appeals overrules the assignment of error based on Inspector Grant's statement that it would be better for the petitioner to tell the truth without even noticing it except insofar as it may be said to be noticed by the general statement that "the other errors assigned are not of sufficient importance to merit consideration."

Petitioner respectfully urges that there is no material difference between the situation dealt with in this assignment of error, and that sustained in the West case, unless it be the difference, unfortunate for petitioner, that since the decision in the West case, the United States Judicial Code has been so amended as to take away from the defendant in a criminal case the *right of writ of error* to this Honorable Tribunal, thus leaving petitioner without remedy except on writ of certiorari, the issuance of which is discretionary.

III. *Petitioner's Statements Being Confessions and Not Voluntary Were Therefore Inadmissible.*

It follows irresistibly from the authorities that if the petitioner's statements were confessions and were not voluntary they are inadmissible:

> "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort" (Mr. Chief Justice Fuller in U. S. vs. Wilson, 162 U. S., 613, at 623, quoted with approval in Bram vs. United States, 168 U. S., 532, at 548).

But the learned Court of Appeals holds in the instant case

> "The crucial test to be applied in determining whether or not a confession is voluntarily or involuntarily made, depends upon its truth or falsity,"

and adds a little further on,

> "Applying this rule, the present confession accords with every reasonable theory of guilt. All

the circumstances in the case corroborate it. Therefore, its admissibility, as competent evidence for the consideration of the jury, is supported by every principle of law."

It is submitted with all deference that this amounts to changing accepted law by judicial definition. This Honorable Court says a confession is admissible if voluntary. The learned Court of Appeals says it is voluntary if it is true, and therefore admissible if true, and proceeds to apply this rule to the instant case by saying that the admissibility of petitioner's confession is "supported by every principle of law," because "all the circumstances in the case corroborate it."

This last statement invites a comparison between the written confession and the physical facts as shown by the record, which petitioner would welcome if he deemed himself at liberty to enter into it without overstepping the limitations of this proceeding. It is sufficient here to say that whatever the results of such a comparison it is is believed that they were irrelevant in the trial court until the confession was properly admitted in evidence, and were then only for the consideration of the jury, and were likewise wholly irrelevant in the Court of Appeals.

IV. *There Was No Issue to Go to the Jury.*

The learned Court of Appeals says in its opinion:

"The testimony of defendant was in the nature of a general denial of the evidence given by the officers and witnesses on behalf of the Government, especially as to defendant's alleged treat-

ment by the officers, which he claims induced him to confess. This, however, presented a well defined issue of fact as to whether or not the confession was voluntarily made, and, like all other issues of fact, was one for the consideration of the jury."

But is is submitted that the statements which the police officers themselves testified that they made to petitioner, and which, of course, the petitioner did not deny, rendered the confessions involuntary as a matter of law. No statement has been relied on in this Petition and Brief as showing the confession to have been involuntary except the uncontradicted statements of the Government's own witnesses, and the same is true with respect to the defendant's brief in the Court of Appeals. The Court of Appeals of the District of Columbia said in the West case heretofore cited:

> "There is no contradiction by him (the defendant) of the words of inducement used by the officers; and those words being such as, under the decision in the Bram case, were sufficient to render the confession involuntary in law, there was nothing to be passed upon by a jury." (20 D. C. App. 347, at 352.)

In view of the uncontradicted statements of the police officers themselves as to the manner in which the confessions of petitioner were obtained, the question as to whether such confessions were admissible in evidence to convict him was wholly one of law.

In the instant case, as said in West's case, there

was nothing which should have been passed upon by the jury.

Respectfully submitted,

JAMES A. O'SHEA,
CHARLES FAHY,
JAMES A. NOLAN, JR.,
Attorneys for Petitioner.

John W. Davis

FREDERIC D. McKENNEY,
WILLIAM C. DENNIS,
Of Counsel.

To HON. JAMES M. BECK,
Solicitor General of the United States.

Please take notice that the foregoing petition and brief in support thereof will be presented to the Supreme Court of the United States on Monday, October 1st, A. D. 1923, at the opening of Court, or as soon thereafter as counsel may be heard.

JAMES A. O'SHEA,
CHARLES FAHY,
JAMES A. NOLAN, JR.,
Attorneys for Petitioner.

John W. Davis

FREDERICK D. McKENNEY,
WILLIAM C. DENNIS.

Service of copy of above notice and of the foregoing petition and brief accepted this day of July, A. D. 1923.

.....

COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. 127

HANG SUNG WAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FREDERIC D. McKENNEY,
WILLIAM CULLEN DENNIS,
JAMES A. O'SHEA,
CHARLES FAHY,
Attorneys for Petitioner.

W. DAVIS,
A. NOLAN, Jr.,
Of Counsel.

CONTENTS.

CASES CITED.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 451.

ZIANG SUNG WAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

GENERAL STATEMENT.

September 30, 1919, the Petitioner, Ziang Sung Wan, a Chinese subject, who had come from Shanghai, China, to the United States in 1916, was indicted by a grand jury in the District of Columbia for murder in the first degree of another Chinese subject, Ben Sen Wu, employed at the time as clerk of the Chinese Educational Mission, located at No. 2023 Kalorama Road, in the City of Washington.

The indictment contained four (4) counts, each

charging the petitioner, hereinafter styled Wan, with killing Ben Sen Wu, hereinafter styled Wu, and differing from each other in the following respects: Counts 1, 2 and 3 charged Wan with the killing of Wu while attempting to commit different offenses punishable by imprisonment in the penitentiary; that is, (1) while housebreaking with intent to commit the crime of forgery; (2) while housebreaking with intent to commit larceny; and (3) with killing while engaged in perpetrating the crime of forgery.[1]

The fourth (4th) count, in apt language, charges petitioner with murder in the first degree in that of his "deliberate and premeditated malice" he did kill Wu with a pistol loaded with gunpowder and metal bullets (R., 1-5).

Upon impanelling the jury and before any witness had been called, counsel for petitioner moved the trial court to require the Government to elect upon which one of the counts in the indictment it would go to the jury. This motion was overruled (R., 24). At the conclusion of the Government's case in chief, counsel again moved that the Government be required to elect upon which count or counts it would stand, and again the motion was denied (R., 122).

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(1) Sec. 798, Code D. C.—"Murder in First Degree.—"Whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, kills another, is guilty of murder in the first degree."

At the conclusion of all the testimony, the District Attorney withdrew counts 1, 2 and 3 from further consideration, and the trial justice thereupon instructed the jury to find its verdict in favor of Wan on each thereof (R., 170), which it did (R., 7) and at the same time found him "guilty of murder in the first degree in manner and form as charged in the said fourth count of the indictment" (R., 7).

The refusal to require such election at an earlier stage of the trial undoubtedly accounts for much of the confusion and unnecessary prolongation of the trial adverted to by the trial justice in his instructions to the jury (R., 169).

There was no witness to the killing of Wu, and all evidence tending to connect Wan with the crime, with the exception of certain confessions on his part which it is contended were illegally extorted from him and improperly admitted in evidence against him over objections seasonably made and duly preserved of record, was wholly circumstantial, and apart from such confessions wholly insufficient to justify a verdict of guilty and to support the judgment sentencing Wan to death on the gallows (R., 8).

In the Supreme Court of the District of Columbia the case was tried before Mr. Justice Gould and a jury. Judgment was passed and entered May 14, 1920, and appeal to the Court of Appeals of said District was prayed and allowed same date—issuance of citation being waived (R., 8).

June 21, 1920, time for submitting bill of exceptions was extended to and including November 1, 1920, on which date draft of bill of exceptions as prepared by counsel for Wan was submitted to the court. Mr. Justice Gould, after a somewhat prolonged illness, died May 20, 1921, without having acted upon same, and thereafter same was submitted for approval to the justice of the Supreme Court of the District of Columbia presiding in Criminal Court No. 1, that is, to Mr. Chief Justice McCoy, on October 28, 1921 (R., 9).

November 22, 1921, counsel for Wan moved to vacate the judgment previously entered against him, to set aside the verdict of the jury and to grant a new trial because of the death of the trial justice, the bill of exceptions as submitted to him not having been settled (R., 10) and such motion was overruled the same day (R., 10-11).

Thereafter, "over the objection and exception on behalf of the defendant (Wan), and after an examination of the typewritten transcript of the stenographic notes of the trial, *certain original exhibits used at the trial, and interviewing the stenographer who reported the proceedings at the trial as to the points where it is stated in the bill such notes were consulted,*" Mr. Chief Justice McCoy, then presiding in Criminal Court No. 1, for reasons stated in his order, including one to effect that "*because* where there has been a difference (between counsel) as to exhibits a comparison by the court of the exhibits is relied upon to sustain the

ruling of the court," "being satisfied that he can allow a true bill of exceptions," signed defendant's bill of exceptions and made the rulings with respect thereto shown therein, "now for then this 30th day of November, A. D. 1921" (R., 180), and ordered same of record *nunc pro tunc* (R., 11). [Italics supplied.]

Specific objection to the general authority of Mr. Chief Justice McCoy to take such action was timely made and exception to the overruling thereof was properly preserved of record (R., 179).

The Court of Appeals of the District of Columbia, after hearing, on May 7th, 1923 affirmed the judgment of the Supreme Court of the District of Columbia (R., 187). The opinion of said Court of Appeals appears at pages 181 *et seq.* of the printed record and is reported in 289 Federal Reporter, 908, *et seq.*

Upon the ground that the learned trial court in the course of the trial improperly and contrary to the Federal rules of evidence expounded by this court in *Bram v. United States,* 168 U. S., 532, *et seq.,* had admitted in evidence certain "confessions" of defendant alleged to have been voluntarily made by him to officers of the law who had him in custody, petition for certiorari was filed in this court, July 24, 1923, and October 17, 1923, the Court of Appeals of the District of Columbia was commanded to send to this court "the record and proceedings in said cause, so that the said Su-

preme Court (of the United States) may act thereon as of right and according to law ought to be done" (R., 189).

Certiorari and return thereto were duly filed in this honorable Court, October 25, 1923, and so the case now comes on for hearing and final disposition.

Statement of the Facts.

The learned Court of Appeals of the District of Columbia as basis for the *ratio decidendi* of its opinion, and as support for its judgment of affirmance, has collated and stated the salient facts and judicial history of the case as follows (R., 181-183):

> Appellant Ziang Sun Wan appeals from a verdict and judgment in which he was found guilty of murder in the first degree and adjudged to pay the death penalty.
>
> It appears that about January 22, 1919, defendant Wan came from New York to Washington and stopped at the Chinese Educational Mission, which at that time was conducted by Dr. Thomas T. Wong, Director, C. H. Hsie, Secretary-Treasurer, and Ben Sen Wu, Secretary and Clerk. Defendant remained at the Mission, located at 2023 Kalorama Road, this city, until January 27th, when he procured a room at the Harris Hotel. On the same day he telegraphed his brother Van in New York City to come to Washington. On the next day he sent a second telegram to his brother urging him to come immediately. On the following day

the brother arrived and was seen at the Harris Hotel between 9:00 and 10:00 o'clock a. m. On the evening of January 29th Kang Li, a student under the supervision of the Mission, called at the Mission and defendant came to the door. He inquired whether Mr. Wu or Dr. Wong were at home. Defendant replied that they had gone out and that he was going out later. About midnight Wan and his brother Van were seen together at the Harris Hotel.

The testimony on *behalf of the Government*[1] shows that on the following morning, January 30th, defendant and his brother engaged a taxicab near the Union Station and drove to the Riggs National Bank, where Wan remained in the cab while Van entered the bank and presented for payment a check in the sum of $5,000, purporting to be signed by C. H. Hsie and Dr. Wong and drawn upon the account of the Chinese Educational Mission. The bank, after some investigation and at the suggestion of the brother, telephoned the Mission but received no reply. The bank then refused to cash the check without further identification and defendant and his brother returned to the Union Station, where the brother paid for the use of the taxicab. About noon of the same day defendant checked out at the Harris Hotel, and about 5 o'clock in the evening the brother was seen near his lodging place in New York, and defendant was seen at a Chinese Cafe in that city at 7:45 p. m. of the same day.

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(1) Italics supplied.

It further appears that Dr. Wong and Hsie were last seen alive between 10 and 11 o'clock on the night of January 29. On January 30th a letter-carrier made three attempts to deliver mail at the Mission but no one responded. On the evening of January 31st, the Chinese Legation caused the Mission to be entered by Kang Li, who found the body of Dr. Wong in the reception hall with two gunshot wounds in his chest, one of which had entered the heart; and the bodies of Wu and Hsie were found in the basement, one having gunshot wounds in the chest and the other gunshot wound in the head. A 32-caliber revolver was found on a chair in the basement.

On February 1st, defendant was arrested in New York and, together with his brother Van, brought to this city. Defendant gave conflicting accounts as to his whereabouts after leaving the Mission on January 27th. He first said that he had left Washington on that date, but when confronted by Kang Li, who saw him at the Mission on the evening of January 29th, he then said that he left Washington on the 29th. When questioned he insisted that he had taken dinner with Hsie and Wong on the evening of January 29th, and that Wong had gone with him to the Union Station where he took a train leaving for New York. When his attention was called to the fact that Wong had dined on the 29th with a Mr. Jeffers, defendant admitted that Wong did not dine with him, but insisted that he did go with him to the station.

Defendant was held in custody at a hotel

until February 8th, when, at his request, he was taken by the officers to the mission. He was there confronted with photostat copies of his own handwriting, and also a photostat copy of a check stub, from the check book of the Chinese Educational Mission, upon which was written "T. T. Wong, $5,000." When confronted with the copies of his own writing and the check stub he finally admitted that he had written the check.

From the Mission House the defendant was taken to the police station and there charged with murder. On the following day the defendant told the officers that he saw the three Chinamen killed and that a Chinaman named Chen had killed them. When urged for an account in detail, he answered that he was tired, but would tell them about it the next day. The following day he again requested to be taken to the Mission, and when they arrived there he began to explain in detail how Chen had killed the three men, but on being told by an officer that he knew that Chen had not committed the murder, defendant then said in effect that he and Wu were engaged in forging the $5,000 check, when Wong and Hsie came into the house; that Wu having procured the revolver killed Wong and Hsie and that he, defendant, a short time after shot Wu. On the following day, February 11th, defendant made a detailed statement to an officer which was taken down stenographically, transcribed, and on February 12th signed by the defendant.

It will be observed that the greatest deliberation and consideration was displayed

by the officers toward defendant when he first suggested at the police station, on Sunday evening, following the first visit to the Mission House, that he witnessed the murder.[1] When pressed for details, "he said he was tired, wanted to go to sleep, would talk no more tonight." They left him to consider the matter until the next morning, when they again visited him in the police station and at his request he was taken to the Mission, where he began to detail the killing, charging Chen with the killing of Wu. At this point one of the officers said "Wan, you know how this happened. You put a man by the name of Chen in it. I know there was no Chen. You are the man that you are placing here in the story as Chen." After hesitating a minute defendant said, "Yes, I will tell you the whole truth. Chen was not in it." After detailing the killing as already outlined, he was taken back to the police station, and not until the next day was he questioned for the purpose of procuring a stenographic report, and not until the following day was he presented with the extended report for his signature. Through all this period he had an opportunity to deliberate upon the effect the making of the confession would have upon his case. It also appears from the signed confession, that before making the statement he was cautioned by the officer as follows: "We would like for you to make a statement. Your statement must be voluntary

(1) It will be observed that this statement involves questions of opinion and inference rather than matters of fact.

and if you make it I want to tell you it will be used against you in court. You do not have to make a statement unless you want to. I just want to inform you of your rights in the matter."

The defense offered as a witness defendant's brother Van, who testified that on January 30th he and defendant went to the Union Station where they met two Chinamen, T. P. Wong and Moy, whom Van had met the day before; that Wong told Van that he had a check which he wanted cashed; that he did not speak English very well, and that he wanted Van to help him cash the check. He testified that it was Wong and not Wan who went with him to the Riggs Bank and remained in the taxicab while he was in the bank attempting to have the check cashed, which he alleges Wong had given him.

The defendant took the stand on his own behalf and denied all connection with the murder, corroborated his brother to the effect that it was Wong and not he who went with Van to the bank; denied that he admitted that the signature on the check stub was his, and accounted for the signed confession on the theory that the officers had importuned him to confess, threatened him, and used abusive language toward him. He testified in substance that when he signed the confession he knew what he was doing, but that he signed it because he was sick and wished to be left alone.

The testimony of defendant was in the nature of a general denial of the evidence given by the officers and witnesses on be-

half of the Government, especially as to defendant's alleged treatment by the officers which he claims induced him to confess. This, however, presented a well-defined issue of fact as to whether or not the confession was voluntarily made, and, like all other issues of fact, was one for the consideration of the jury. The issue of the voluntary or involuntary character of the confession was submitted to the jury in a very ful and complete charge, in part as follows: "The test of the case, and the inquiry that you will have to make in answer is: Did the questioning, did the physical condition, did the importunate questioning, if you choose to call it so, render the confession made by this defendant not his own; but did it substitute for his will the will of another, and thus was it or not his voluntary act? It is impossible to define the limit to which an officer may or should go in detecting or attempting to detect crime. On the one side he has his duty to the public, to us, always. On the other hand, he must not infringe upon the rights of the citizen, no matter who he may be. He must leave the confession in such a way that you can satisfy yourselves that it is the ultimate expression of the will of the defendant, the voluntary statement of what he knows about his connection with the case."

In compiling such statement of facts, the learned Court of Appeals of the District of Columbia inadvertently fell into error in certain particulars of minor character and importance, about which there

can be no real dispute on the record, and to which, in the interest of precision, we venture to call attention.

At page 181, fifth and fourth lines from bottom, it is said "and defendant (Wan) was seen at a Chinese cafe in that City (New York) at 7.45 p. m. of the same day" (*i. e.*, January 30 1919).

This is a mistake, and there is nothing in the testimony at any point to support it.

Mrs. Bartels, a landlady, with whom petitioner Wan and his brother Van lived, at 313 112th Street, New York City, and the only witness other than the brothers who testified upon the point, gave testimony tending to prove that Wan left New York City for Washington January 22, 1919; "the next time he was there was a week from Thursday, the 23d of January, 1919, that is, January 30, 1919." "Witness saw him (Van) that Thursday afternoon between four and five o'clock on the street going to the store; did not see Wan that day, and saw him the next day, Friday (January 31st) in the morning, * * * he was lying in bed sick" (R., 25). Van states that upon arrival in New York between four and five, early, went to room, undressed defendant, and put him to bed" (R., 125). Wan says "when arrived there in afternoon, went to place where was rooming, 313 West 112th Street; went to bed; Van went out and bought witness something to make some soup, * * * witness (Wan) did not go out at all" (R., 137).

This is all of the evidence on the point.

The expression used by the learned writer of the opinion of the Court of Appeals first appeared on page 3 of the Government's brief in that court and referred to Ben Sen Wu, the murdered man, not to his alleged murderer, and to a different date, January 29th, not January 30th.

Again, at page 182, it is said "on February 1st, defendant (Wan) was arrested in New York, and, *together with his brother Van,* brought to this city." (Italics supplied.)

Burlingame, a member of the Washington detective force, who went to New York with an associate, Kelly, and a Chinese student, Kang Li, says that "defendant (Wan) had expressed a wish to go to Washington, might be something he could do to assist in locating the murderers of his friends," and he *returned voluntarily* (R., 59, 60), and Major Pullman, Superintendent of Police, states "we told him (Wan) we appreciated his coming,—he came of his own accord" (R., 92).

Detective Kelly, who was with Burlingame on this occasion, says that he went to New York Sunday, February 2d, "and brought Van to Washington on Monday, February 3d" (R., 101, 104). This was two days after Wan had returned with Burlingame (R., 59).

Again, at page 182, it is said "When questioned he (Wan) insisted that he had taken dinner with Hsie and Wong on the evening of January 29th, and that Wong had gone with him to the Union Station where he took a train," &c., whereas Major

Pullman's statement on the subject plainly indicates that the name "Wong" and the names "Hsie and Wong" had been mistakenly substituted for "Wu" (R., 92).

Again, at the end of the third paragraph of page 182, it is said, referring to defendant Wan, "When confronted with the copies of his own writing and the check stub, he finally admitted that he had written the check." This is a mistake, for the check at no time was in evidence and what Wan, in the course of the testimony, was alleged to have admitted was that he had written the "T. T. Wong $5,000" on the stub (R., 93).

Again, according to the statement of the opinion, the defendant Wan "told the officers that he saw the three Chinamen killed and that a Chinaman named Chen had killed them" (R., 182).

The testimony upon this point, given by Inspector Grant, was that

> "He saw all three killed, but did not take any part in it; that a man named Chen had killed Wu after Wu had killed Dr. Wong and Mr. Hsie" (R., 81, 90).

and this statement is specifically corroborated by Kelly at page 103 of the record.

Again, at page 183, it is said that Van "testified that on January 30th, he and (Wan) went to the Union Station where *they* met the two Chinamen, T. P. Wong and Moy," whereas Van's uncontradicted statement which appears at page 124 of the

record was that having seated Wan he "went over to find information about trains to New York" and he "looked into the men's waiting room, see the two fellows T. P. Wong and Moy," &c., there being no testimony at any point in the record to the effect that the defendant Wan ever saw or came in contact with the Chinamen Wong and Moy, but that after Wan and Van had returned to New York, he (Van) "told brother met the two fellows, the tall fellow, T. P. Wong, and gave him description," &c., &c. (R., 125).

Again, at page 184, after quoting Wan's statement as follows:

> "Mr. Grant, after what you said, who is the man who went to the bank; who is the murderer?"

the opinion continues:

> "Counsel for defendant moved to strike out this statement for the reason that it was not shown to have been voluntarily made, but was made in reply to an inducement by the officer. Counsel seems to have regarded the statement as a confession."

The sentence above quoted was made in the course of defendant (Wan's) testimony while on the stand in his own behalf, and appears in paragraph 2 on page 140 of the Record. Inspection of that page shows that this statement of Wan's was not followed by any motion of counsel to strike out at all, the fact being that assignment of error in

this regard is based upon Inspector Grant's own narrative of the alleged occurrence, which first appears at page 79 of the Transcript of the Record, where, after asking "Who went to the bank?" and saying to Wan "That has nothing to do with the murder; tell me who went to the bank," Wan is said to have replied "If you get the man who went to the bank, you will get the murderer." At this point it was that counsel for the defendant moved that the statement quoted "be stricken out, on the ground that it was not shown to be voluntary and was made in reply to statements of the police officer in the nature of an inducement."

With the corrections noted, which, as stated, are with reference to minor rather than major matters, and with additions thereto by reference and extracts from the bill of exceptions itself, which will be made and occur in the course of the argument to follow, petitioner is content to accept the above statement of the facts by the Court of Appeals as affording fair basis for the argument which follows.

Assignments of Error.

It was error in the circumstances to admit in evidence against petitioner, and submit to the jury for its consideration the confessions testified to by the police officers Pullman, Grant, Burlingame, and Kelly, from which an inference of guilt might be drawn and upon the acceptance of which by the

jury as voluntary and true, the verdict of guilty returned in this case alone can be upheld.

Error in holding that the "crucial test to be applied in determining whether or not a confession is voluntarily or involuntarily made, depends upon its truth or falsity."

Error in holding that evidence of the financial condition of the accused at and prior to the time of the homicide and the adoption of a *presumption* that he was indebted to Wu at the time of the homicide could rightly be considered and accepted by the jury as establishing motive for the commission of the crime.

Error in holding that Section 953 of the Revised Statutes of the United States as amended by Act of Congress of June 5, 1900 (31 Stats. L., 270), is applicable to cases tried in and before the Supreme Court of the District of Columbia.

Error in holding that counsel for Wan had waived all right to claim error on appeal with respect to the certain examination by the learned trial justice of said Wan when on the stand as a witness in his own behalf, as said examination and colloquy respecting same appears at pages 151 to 155, both included, of the transcript of record before this honorable court.

Error in sustaining the refusal of the learned trial justice to permit the petitioner when on the stand as a witness in his own behalf to state what K. S. Wang, when acting under instructions of Inspector Grant, who had petitioner in charge, had said to him.

The most important question in this case before the Court of Appeals of the District of Columbia and before this Honorable Court is as to the admissibility in evidence of various statements made by petitioner which were admitted over his objection in the trial, exceptions being duly noted and error assigned on the ground that they were each and all confessions shown by Government's witnesses to be involuntarily made. These statements will be discussed in the order in which they appear in the record under two genral heads,—*First*, were they "confessions," and *Second*, were they voluntarily made?

I. Petitioner's Statements Were "Confessions."

The opinion of the learned Court of Appeals in sustaining the ruling of the trial court in admitting the statements in question raises *in limine* the fundamental issue, what is a "confession?" Is an exculpatory statement or any statement not intended as a direct admission of guilt a confession and therefore to be excluded unless voluntarily made? The Government strenuously contended in the Court of Appeals for the negative of this proposition; that is to say, that only a direct admission of guilt is a confession, and the Court of Appeals sustained this contention.

(1) *Statement Friday, February 7th, at the Dewey Hotel, "If you get the man who went to the bank, you will get the murderer.*[1]

The first statement raising this issue was made on Friday afternoon, February 7th, after the petitioner, ill, *incommunicado*, "in a foreign land" (to use the language of this Honorable Court in the *Bram* case, *Bram v. U. S.*, 168 U. S., at p. 563) had withstood long continued, pertinacious and harassing examinations by the police officials for an entire week. Then, in the course of one of these examinations, the following took place, as stated by the learned Court of Appeals in its opinion:

> "An officer testified that while defendant was at the hotel he was being questioned by the witness respecting the taking of the check to the bank. The officer asked him who went to the bank, suggesting 'that has nothing to do with the murder, tell me who went to the bank;' and the defendant said

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(1) It will be observed that in its opinion the Court of Appeals uses the language in which the petitioner testified to this statement: "Who is the man that went to the bank, who is the murderer?" (R., p. 140). This statement had, however, previously been admitted, over petitioner's objection and exception duly noted, in the following form, as testified by Inspector Grant: "If you get the man who went to the bank, you will get the murderer" (R., p. 79). Inspector Grant repeated substantially the same language on his cross-examination (R., p. 85). Lieutenant Burlingame, over petitioner's objection and exception, had also testified to practically the same language: "If you find the man who went into the bank with the check, you will find the murderer" (R., p. 65). Compare cross-examination (R., p. 75).

> 'Mr. Grant, after what you said, who is the man who went to the bank; who is the murderer?'" (R., p. 184.)

This statement was admitted over petitioner's motion to strike and exception duly noted, on the ground that it was not shown to have been voluntarily made. The learned Court of Appeals held that there was no merit in the petitioner's assignment of error, not on the ground that the statement was in truth voluntary, but on the ground that it was not a "confession." The opinion of the Court of Appeals on this point reads as follows:

> "Counsel seems to have regarded the statement as a confession. It was not even an admission of defendant's connection with the transaction. It was a mere casual observation which an innocent bystander might logically have made. At the stage of the investigation when the statement was made, it had not more significance, coming from guilty lips, than if it had been innocently uttered. It only became a significant circumstance, when in his confession defendant subsequently admitted that he and his brother took the check to the bank, and his further statement in the confession that the forgery of the check was directly associated with the commission of the murder" (R., p. 184).

It is submitted with all deference that this is not the law as laid down by this Honorable Court. From the point of view of the detective to whom

this statement was made, who knew that petitioner's brother had gone to the bank and doubtless believed that petitioner had accompanied him, petitioner himself was "the man who went to the bank," and the statement was offered by the Government to prove out of petitioner's own mouth that he was the murderer. From the point of view of the petitioner on the other hand, the statement may be regarded as exculpatory as tending to shift suspicion from himself to "the man who went to the bank." The petitioner had at that time not admitted that he went to the bank. Petitioner afterwards in the course of further confessions, the admissibility of which is also disputed, admitted having gone to the bank, but he repudiated this admission along with the rest of the confessions and testified at his trial that he did not go to the bank. But whether petitioner's statement was on its face incriminatory or exculpatory, in either case it might in the light of all the circumstances tend to implicate him in the commission of the crime charged, and on that theory was offered in evidence by the Government and admitted by the court over petitioner's objection, and it is now too late to justify its admission as "a casual observation."

In the *Bram* case this court, dealing with statements on their face exculpatory, but offered "because of an implication of guilt" (168 U. S., at p. 562), namely, a statement made by Bram that one Brown "could not have seen me; where was he?"

and again, the statement, "well I think and many others on board the ship think that Brown is the murderer," held these statements to be confessions and subject to the rules of exclusion applying thereto. The opinion of the court on this point, handed down by the late Chief Justice White, then Associate Justice, is as follows:

> "The principle on the subject is thus stated in a note to section 219 of Greenleaf on Evidence; 'The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess. *Rex v. Tyler,* 1 C. & P. 129; *Rex v. Enoch,* 5 C. & P., 539. See further, as to the object of the rule, *Rex v. Court,* 7 C. & P., 486, per Littledale, J.; *People v. Ward,* 15 Wend., 231.' Nor from the fact that in *Wilson v. United States,* 162 U. S., 613, mention was made of the circumstance that the statement of the accused was a mere denial of guilt accompanied with exculpatory explanations, does the decision of that case conflict with the principle we have just stated. The ruling there made that error to the prejudice of the accused did not arise from the admission of the statement there considered, was based not alone upon the nature of the statement, but upon 'the evidence of its voluntary character; the absence of any threat, compulsion or inducement; or assertion or indication of fear; or even of such influence as the administration of an

oath has been supposed to exert' (p. 624).

"The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then after procuring its admission claiming that it did not tend to prove guilt, and could not, therefore, have been prejudicial, has been well stated by the Supreme Court of North Carolina, *State v. Rorie* (1876), 74 N. C., 148:

"'But the State says this was a denial of guilt and not a confession. It was a declaration which the State used to procure a conviction; and it is not for the State to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precluded the State from saying that it was not used to his prejudice" (p. 150). (*Bram v. United States*, 168 U. S., 532, at 541-542.)

(2) *Alleged Statement Saturday Night, February 8th, at the Mission House, That Petitioner Wrote the $5,000 Check Stub.*

The next day, Saturday, February the 8th, the police officers took the petitioner to the Mission House where the murder had been committed and kept him up all night, going over the details of the crime as they had worked them out and ceaselessly questioning him in relays from 7:30 p. m. to 5:00 a. m. During the course of this questioning, peti-

tioner, according to the testimony of the officers, admitted that the entry on the check stub in the check book of the Educational Mission, "T. T. Wong, $5,000," was in his handwriting. Petitioner on the stand denied making this statement, saying that he merely said it looked like his handwriting. The admission of this statement was assigned as error, but the Court of Appeals holds:

> "As to the alleged admission respecting the handwriting, it does not come within the category of a confession, since it is admitted by defendant in his signed confession, testified to by the officers, and denied by defendant on the witness stand. Hence it is reduced to a mere fact or piece of competent evidence upon which there was a conflict in the testimony, and which was properly submitted to the jury for its consideration" (R., p. 184).

In passing, it is earnestly submitted that if this statement was inadmissible as a matter of law as a confession involuntarily made, it could not have become admissible because the defendant later denied making it. (*West v. United States,* 20 App. D. C., 347, at p. 352.) But the present point is that the Court of Appeals holds it admissible because it was not a confession, for the learned court proceeds:

> "The term confession has no application to a mere admission or statement of an independent fact from which guilt may be inferred; or even to incriminating acts. *State v. Campbell,* 73 Kans., 688; *Rusher v. State,*

oath has been supposed to exert' (p. 624).

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(2) *Alleged Statement Saturday Night, February 8th, at the Mission House, That Petitioner Wrote the $5,000 Check Stub.*

The next day, Saturday, February the 8th, the police officers took the petitioner to the Mission House where the murder had been committed

Footnote to Heading 2, to be Inserted on Page 24.

Lt. Burlingame testified with reference to the $5,000 check stub over petitioner's objection and exception:

"They pressed him for an answer as to who wrote that. He looked at it for some time, probably two or three minutes before he answered, then said 'Well, I think I write that.' The Major said, 'I don't want you to tell me what you think, you know whether you wrote it or not.' Then he said, 'I write that.' referring to the writing on the stub of the check book." (R., 67.)

For Inspector Grant's testimony over objection duly noted in regard to the same incident see Record, pages 79 and 80. Cross-examination, pages 87, 88. For Major Pullman's testimony, see Record, pages 98, 98, 99.

tioner, according to the testimony of the officers, admitted that the entry on the check stub in the check book of the Educational Mission, "T. T. Wong, $5,000," was in his handwriting. Petitioner on the stand denied making this statement, saying that he merely said it looked like his handwriting. The admission of this statement was assigned as error, but the Court of Appeals holds:

> "As to the alleged admission respecting the handwriting, it does not come within the category of a confession, since it is admitted by defendant in his signed confession, testified to by the officers, and denied by defendant on the witness stand. Hence it is reduced to a mere fact or piece of competent evidence upon which there was a conflict in the testimony, and which was properly submitted to the jury for its consideration" (R., p. 184).

In passing, it is earnestly submitted that if this statement was inadmissible as a matter of law as a confession involuntarily made, it could not have become admissible because the defendant later denied making it. (*West v. United States,* 20 App. D. C., 347, at p. 352.) But the present point is that the Court of Appeals holds it admissible because it was not a confession, for the learned court proceeds:

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94 Ga., 363. In other words, an admission not of guilt, but tending merely, in connection with other facts, to establish guilt, does not amount to a confession. *McGehee v. State,* 171 Ala., 19, 21; *People v. Jan John,* 144 Cal., 284; *State v. Willis,* 71 Conn., 293; 2 Wigmore on Evidence, Sec. 1050.

"A confession is a declaration made by a person charged with crime acknowledging his participation in its commission" (R., pp. 184-185).

It is submitted with all deference that here again is a plain departure from the rule in the *Bram* case which excludes "not only direct confessions but any other declaration tending to implicate the prisoner in the crime charged." Certainly if the petitioner said that he wrote the entry on the check stub this had some tendency to implicate him in the crime charged, and it was admitted on this theory. The weight of the evidence is immaterial. As this honorable court said in the *Bram* case:

"It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which

resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt" (*Bram v. United States,* 168 U. S., 532 at 541).

(3) *Statement Sunday February 9th at the Precinct Station that Petitioner was Present at the Scene of the Crime and Saw One Chen Kill Wu After Wu had Killed Wong and Hsie.*

The assignment of error in regard to the admission of this vitally incriminating statement is not specifically dealt with by the learned Court of Appeals in the course of its opinion.

The Government in its brief in the Court of Appeals argued that this statement was not a confession, but "at most, only an admission against interest" relying among other authorities, on 2

Footnote to Heading 3, to be Inserted on Page 27.

Inspector Grant over objection made and exception noted testified as follows:

"Q. Will you tell me what occurred on that occasion as nearly as you can recall?"

"A. There is where this man said he wanted to tell his story, and he told me about seeing all three of these men killed." (R., p. 80.)

* * * * * * *

"Defendant then told witness he saw all three killed, but did not take any part in it; that a man named Chen had killed Wu after Wu had killed Dr. Wong and Mr. Hsie." (R., p. 81.)

Lt. Burlingame (R., p. 68) testified to the same effect over defendant's objection and exception.

For Lt. Kelly's testimony, see R., pages 102, 103.

resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt" (*Bram v. United States,* 168 U. S., 532 at 541).

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The Government in its brief in the Court of Appeals argued that this statement was not a confession, but "at most, only an admission against interest," relying, among other authorities, on 2 Wigmore on Evidence, Section 1051. The learned Court of Appeals in overruling the exception and the admission of the defendant's statements with respect to the handwriting on the check stub, also relies on Wigmore, Section 1050.

Prof. Wigmore in the course of his discussion of

the subject of admissions, Section 1050, does indeed distinguish between admissions and confessions, and supports the limited definition of confessions contended for below by the Government and adopted by the learned Court of Appeals in its opinion. Prof. Wigmore, however, is careful to cross-reference this section, which deals primarily with admissions, with his discussion of confessions at Section 821, and in this section he frankly admits that the doctrine for which he is contending is not the law in the courts of the United States. In Section 821, Prof. Wigmore seeks to distinguish between confessions and guilty conduct, exculpatory statements, and acknowledgments of subordinate facts not directly involving guilt, and he cites a number of cases in support of his statement in the text that "exculpatory statements denying guilt cannot be confessions," and that "this necessary meaning for the term confession is generally conceded." (Wigmore, Section 821, 1st Edition, pp. 928-9.) But in his footnote he follows the cases cited in support of this proposition with the following sweeping and specific admission:

> "In the Federal Supreme Court this doctrine is ignored: 1896 *Wilson v. U. S.*, 162 U. S., 613, 621; 16 Sup., 895 (here exculpatory assertions were admitted, yet after a discussion of the principles of confession): 1897 *Bram v. U. S.*, 168 *Id.*, 532; 18 Sup., 183 (a statement in which the defendant exculpated himself by asserting that a witness B. could not have seen the defendant do the act, and

that he thought the witness B. did it, excluded as a confession; this *Bram* case, in this, as in other respects, reached the height of absurdity in misapplication of the law)."
(Petition, p. 20; Wigmore on Evidence, 1st Edition, Section 821, p. 929, footnote 2.[1]

It is respectfully submitted that the authority relied on by the Government below and by the learned Court of Appeals proves too much. It proves that the distinction contended for has been repudiated, not merely once, but twice by this honorable tribunal, for as Prof. Wigmore himself points out, the Wilson case, so far as its *ratio decidendi* is concerned, is just as conclusive on this point as the Bram case.

In the Wilson case the defendant was convicted of murder after a trial in which certain statements made by him before the United States Commissioner had been admitted in evidence over his objection and exception duly taken. What these statements were are not disclosed in detail in the report of the case, but the statement of facts does show that "this statement was throughout a denial of guilt, but contained answers to questions which were made the basis for contradiction on the trial." (*Wilson v. United States,* 162 U. S., 613, at 616.)

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(1) The Second Edition of Professor Wigmore's treatise adds: "But later cases, cited *post passim*, have discredited the *Bram* case in general" (Wigmore's Second Edition, Sec. 821, footnote 2, p. 136). Compare cases cited and discussed, *infra*, II, 2.

Chief Justice Fuller, who delivered the unanimous opinion of the court, used the following language:

> "This brings us to consider the exception taken to the admission of defendant's statement in evidence. The ground of the objection was that it was not voluntary. Although his answers to the questions did not constitute a confession of guilt, yet he thereby made disclosures which furnished the basis of attack, and whose admissibility may be properly passed on in the light of the rules applicable to confessions" (p. 621).

Then after laying down the general rule in regard to confessions the court quotes from *Hopt v. Utah,* 110 U. S., 574, as follows:

> "'But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law. Tested by these conditions, there seems to have been no reason to exclude the confession of the accused; for the existence of any such induce-

> ments, threats or promises seems to have been negatived by the statement of the circumstances under which it was made.' "

The learned court proceeds:

> "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort" (pp. 622-623).

Later on in the opinion the court reverts to the point that the statements here in question were not direct statements of guilt, saying:

> "His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion" (p. 624).

And, again, pointing out that the prisoner

> "Was not confessing guilt but the contrary" (p. 624).

It is to be noted that the decision in the Wilson case was unanimous, and was handed down by Chief Justice Fuller who dissented in the Bram case, and that the dissent in the Bram case was not based upon any difference of opinion as to distinction between confessions and admissions, but purely upon the question whether or not the confession in that case was under all the circumstances voluntary.

It is therefore submitted that it is the settled law of this court that the rule against confessions

> "excludes not only direct confessions but any other declaration tending to implicate the prisoner in the crime charged even though in terms it is an accusation of another or a refusal to confess" (*Bram case, supra*, p. 23).

and it is further submitted that this rule was expressly and in terms repudiated by the learned Court of Appeals in the instant case.

Exercising the freedom from constraint and from control which commentators on judicial decisions enjoy, but which is denied to inferior courts in our system of jurisprudence, Professor Wigmore hesitates not at all to stamp his lively disapproval upon the views expressed *arguendo* and the conclusions announced by this august tribunal in its opinion in the Bram case, saying as above quoted with respect to the holding in the Bram case with respect to the particular point herein involved, *i. e.*, the legal definition of the word confession, "this Bram case, in this as in other respects, reached the height of absurdity in misapplication of the law." In other passages in his work on evidence Prof. Wigmore, in reference to the doctrines in the Bram case uses such language as "the highest pitch of irrationality on this subject"; "cloud the reputation of the Federal Supreme Court"; "that case should be forgotten," and more to the same purpose.

The learned Court of Appeals, restrained by its

sense of judicial propriety, has refrained from criticism or comment, but none the less it would seem in silence to have disregarded, not to say ignored, the authoritatively declared principles of law expounded in the Bram case upon which petitioner relied for his defense against illegal conviction. Although the Bram case was earnestly pressed upon the Court of Appeals by petitioner's counsel, that learned court makes no reference thereto except by way of reference to and comment on a time-honored passage of Russell on Crimes which was incorporated in the Bram case.[1]

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(1) The reference in the opinion of the Court of Appeals to the Bram case is as follows:

"The rule as to the admissibility of confessions is concisely stated in 3 Russell on Crimes (6th Edition), 478, and approved in *Bram v. United States*, 168 U. S., 532, 548, as follows:

"'But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.'"

and its comment upon such rule is as follows:

"In all cases, however, the confession must have been induced by the excitation of hope or fear arising from an actual threat or promise made by a person in authority. *Hardy vs. United States*, 3 App. D. C., 35, 46. Or as concisely summarized in the Bram case 'it must necessarily have been the result of either hope or fear, or both, operating on the mind.' * * * The crucial test to be applied in determining whether or not a confession is voluntarily or involuntarily made, depends upon its truth or falsity" (R., p. 185).

In passing it may be noted that the expression quoted from the Bram case, "It must necessarily have been the result of either hope

It is submitted that the principles of decision in Bram's case were both pertinent and applicable in the highest degree to the facts in the instant case.

If those principles in fact reach heights of "absurdity in misapplication of the law," which we deny, courts throughout the United States should be so advised, and that can be done authoritatively only by this court itself.

If those principles are and remain the just expression of the best thought and judgment of this court, of final earthly resort, then the petitioner and his trial counsel charged with his defense in matters of law, were and still ~~not~~ are entitled to rely upon them, and both the trial and appellate courts should have yielded ready submission to their existing expression.

Anything less than this would be to substitute untrammeled individual view for controlling judicial precedent, and to effect conviction of one charged with a capital offense otherwise than in accordance with law. In such a scheme of things, passion and prejudice would run unrestrained and the constitutional provision in favor of liberty and life and the prohibition against self-incrimination and being compelled to give evidence against one's self would degenerate into an empty phrase.

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or fear, or both, operating on the mind" when examined in its context appears to be the conclusion of this court from the specific facts of the Bram case and not as might be inferred from the language of the learned Court of Appeals, a statement of a general principle. See *Bram vs. U. S.*, 168 U. S., 532, at 542.

(4) *Oral Statement of Petitioner Monday, February 10th, at the Mission House.*

(5) *Written Statement of Petitioner Dictated Tuesday, February 11th, Signed Wednesday, February 12th.*

It is conceded that these two statements are confessions and therefore their admissibility depends upon whether they were voluntarily made.

It is respectfully submitted that the opinions and judgments of this Honorable Court in *United States v. Wilson*, 162 U. S., 613, and *United States v. Bram*, 168 U. S., 532, conclusively establish that petitioner's statements and alleged statements were confessions under the Federal rule, and that the decision of the learned Court of Appeals of the District of Columbia in the instant case squarely and openly departs from the rule established by this Honorable Tribunal.

It is further respectfully submitted that the Federal rule is bottomed on reason as well as on authority. There is no serious dispute as to the reason for the rule. As Prof. Wigmore phrases it, confessions were excluded because they were thought to be "under certain conditions tes-

Footnote to Headings 4 and 5, to be Inserted on Page 35.

The oral statement of the petitioner made Monday, February 10, 1919, at the Mission House is set forth, over petitioner's objection and exception, in the testimony of Lt. Burlingame at pages 68 and 69 of the Record. For cross-examination, see Record, pages 75, 76, 77. The oral statement is also testified to by Inspector Grant over petitioner's objection and exception, Record, page 81. Cross-examination, see Record, page 91.

The written confession of the petitioner in the form of answers to questions propounded by Lt. Burlingame which was admitted over defendant's objection and exception is set forth in full at pages 106 to 120 of the Record.

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It is further respectfully submitted that the Federal rule is bottomed on reason as well as on authority. There is no serious dispute as to the reason for the rule. As Prof. Wigmore phrases it, confessions were excluded because they were thought to be "under certain conditions testimonialy untrustworthy" (Wigmore on Evidence, 1st Edition, Sec. 822), that is to say, likely to be untrue, and it is submitted that this testimonial untrustworthiness adheres as much under the given conditions in exculpatory declarations "tending to

implicate the prisoner in the crime charged" as in "direct confessions."

II. Petitioner's Confessions Were Not Voluntary.

In considering this question as to each and all of the several confessions made, the Court is respectfully requested to consider, *first,* the petitioner's situation as disclosed in the barest outline in the statement of facts set forth in this brief and abundantly shown by the record, and, *second,* the specific representations from time to time made to the petitioner by the police officers. It is submitted that in the light of the general situation and the remorseless and accusatory questioning of the police officers, each and every one of the confessions made is inadmissible under the doctrine of the Bram case, quite irrespective of any specific promise or threat held out to petitioner by the police officers. Petitioner's situation: sick, alone, a stranger in a strange land, held *incommunicado* and ceaselessly accused and questioned, compelled him to talk and in and of itself rendered any and every confession which he made involuntary.

(A) Petitioner's General Situation Rendered His Confessions Involuntary.

1. *Petitioner Was Not a Free Agent.*

In the *Bram* case (at p. 561), this Honorable Tribunal states the general situation of the defendant as follows:

"Before analyzing the statement of the police detective as to what took place between himself and the accused it is necessary to recall the exact situation. The crime had been committed on the high seas. Brown, immediately after the homicide, had been arrested by the crew in consequence of suspicion aroused against him, and had been by them placed in irons. As the vessel came in sight of land, and was approaching Halifax, the suspicions of the crew having been also directed to Bram, he was arrested by them and placed in irons. On reaching port, these two suspected persons were delivered to the custody of the police authorities of Halifax and were there held in confinement awaiting the action of the United States consul, which was to determine whether the suspicions which had caused the arrest justified the sending of one or both of the prisoners into the United States for formal charge and trial. Before this examination had taken place the police detective caused Bram to be brought from jail to his private office, and when there alone with the detective *he was stripped of his clothing,* and either whilst the detective was in the act of so stripping him, or after he was denuded, the conversation offered as a confession took place."

And, again, on page 563:

"And these self-evident deductions are greatly strengthened by considering the place where the statements were made and the conduct of the detective towards the ac-

> cused. Bram had been brought from confinement to the office of the detective, and there, when alone with him, in a foreign land, while he was in the act of being stripped or had been stripped of his clothing, was interrogated by the officer, who was thus, while putting the questions and receiving answers thereto, exercising complete authority and control over the person he was interrogating. Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who in law could be considered a free agent" (*Bram v. United States,* 168 U. S., 532, at pp. 563-564).

If Bram were not a free agent under the above circumstances, can there be any doubt that the petitioner was not a free agent, situated as he was? Bram, as far as is disclosed by the record, was a well man, examined for a few moments alone by a police officer "in a foreign land" to be sure, for it was at Halifax, but among people enjoying the same "language, institutions and laws." Petitioner was a sick[1] man then about twenty-four years old (R., p. 135), is of an alien race as well as foreign

[1] The record shows that before coming to Washington petitioner had been sick quite a while with Spanish influenza (R., p. 26). Lieut. Burlingame testifies, referring to the period from Saturday, February

nationality and English is to him a foreign tongue, with which at that time he was only imperfectly acquainted (R., p. 94). Can the mere fact that Bram was for a few moments stripped of his clothing (the only circumstance of hardship in his case which is not found in the instant case) outweigh in its moral effect petitioner's detention by the police, for more than ten days and nights, always under the immediate surveillance of a police officer in uniform, eating and sleeping when permitted to sleep only in such presence, subjected to repeated questionings and accusatory suggestions by the higher police officials, suffering always with a chronic illness, and the weakness resulting therefrom, which, according to Dr. James A. Gannon of the Hospital Staff of the Jail, induced "great fatigue plus great pain," so that the petitioner was so exhausted that "he would really do anything to have the torture stopped" (R., pp. 159, 160).

(2) *Petitioner "Had to Talk."*

Another vital element in petitioner's general situation was the ceaseless accusatory questioning infinitely greater in degree than that in the *Bram*

1st, to Friday, February 6th, "he was sick all that time, most of the time in bed" (R., p. 64). Dr. Gannon and Dr. Verbrycke testified that petitioner was suffering from spastic colitis or a contraction of the large bowel (R., p. 158, 164). Dr. Gannon described him on February 13th as "lying in a bunk in the cell, very weak, very much exhausted, very much emaciated" (R., p. 157). Dr. Verbrycke described him about the middle of February as "flat in bed, apparently in a weakened condition" (R., 163, 164).

case, which it is submitted in accordance with the rule laid down in the *Bram* case renders inadmissible all the confessions obtained in this case. Inspector Grant testified:

> " 'I wanted to straighten out a great many circumstances which pointed to him;' witness being asked if he wanted to get some talk out of him which would fasten the crime on him, answers, 'I wanted to clear up this crime, yes, sir;' * * * wanted to know from him whether he was guilty; wanted him to tell the truth; * * * witness said, 'We are all firmly of the belief that you know who killed those men;' sat and watched him and looked at him carefully and for a long time after I would tell him those things and would say, 'Now, you think it over,' and stayed right there with him.
>
> "Q. Your purpose in telling him those things was to make him talk?
>
> "A. My purpose was to get him to tell me the truth about this case.
>
> "Q. Answer the question, will you?
>
> "A. Well, he had to talk" (R., pp. 89-90).

Again, Lieutenant Burlingame testified as follows:

> "In the room on the third floor early Sunday morning, when Mr. Kelly was pressing defendant for an answer, the reason witness stated to him, 'Why don't you answer, why don't you tell Mr. Kelly what he wants,' was because defendant had been asked several questions and he was in a rather embarrass-

ing position; if he answered the question he would have to implicate himself and he refused to answer, and witness said to him, 'Why don't you answer the question one way or the other or tell Mr. Kelly what he is asking you;' being asked if witness was not trying to force an answer out of him, witness replied, 'You might put it that way;' witness asked him, 'Why don't you answer? Answer Mr. Kelly's question; * * *' " (R., p. 75).

The corresponding facts in the Bram case are stated in the opinion of this honorable court:

"The detective repeats what he said to the prisoner, whom he had thus stripped, as follows:

" 'When Mr. Bram came into my office I said to him: "Bram, we are trying to unravel this horrible mystery." I said: "Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder." He said: "He could not have seen me. Where was he?" I said: "He states he was at the wheel." "Well," he said, "he could not see me from there." ' " *Bram v. United States,* 168 U. S., 532, at p. 562.)

And this court comments thereon as follows:

"The fact, then, is, that the language of the accused, which was offered in evidence as a confession, was made use of by him as a reply to the statement of the detective that

Bram's co-suspect had charged him with the crime, and, although the answer was in the form of a denial, it was doubtless offered as a confession because of an implication of guilt which it was conceived the words of the denial might be considered to mean. But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrows any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

"It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how in reason can it be said that the answer which he gave and

which was required by the situation was wholly voluntary and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. Indeed, the implication of guilt resulting from silence has been considered by some State courts of last resort, in decided cases, to which we have already made reference, as so cogent that they have held that where a person is accused of guilt, under circumstances which call upon him to make denial, the fact of his silence is competent evidence as tending to establish guilt. Whilst it must not be considered that by referring to these authorities we approve them, it is yet manifest that if learned judges have deduced the conclusion that silence is so weighty as to create an inference of guilt, it cannot, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime, would not be impelled to say something, when informed by one in auauthority that a co-suspect had declared that he had seen the person to whom the officer was addressing himself, commit the offense, when otherwise he might have remained silent, but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him, or of hope that if he did reply he would be benefited thereby." (*Bram v. United States,* 168 U. S., 532, at pp. 562-563.)

Like Bram, but in a much greater degree than Bram, petitioner "had to talk." It was not "left to the prisoner a matter of perfect indifference whether he should open his mouth or not" (*Reg. v. Baldry,* 1852, 2 Den. C. C., 430, at p. 442, quoted with approval in *Bram v. United States,* 168 U. S., 532, at 554), and it is respectfully submitted that to conclude that the confessions which were thus extracted from him were "wholly voluntary and in no manner influenced by the force of hope or fear" would, in the language of this honorable court in the *Bram* case, "be to deny the necessary relation of cause and effect" (168 U. S., 563).

The following cases, both Federal and State, are relied on not only as in accord with the general principles of law laid down by this honorable tribunal in the Bram case, but as giving correct scope and sway to these principles in their application to complicated and varying states of facts arising under the "sweating" or "third degree" tactics which the police officers are showing a tendency to adopt, and which is beginning to receive the unfavorable notice of the State legislatures:

Federal Cases.

Purpura v. United States (1919), Circuit Court of Appeals, Fourth Circuit, 262 Federal, 473:

The defendant was charged with stealing a package from the postoffice and made a confession which was introduced in evidence against him on

his trial. This confession was obtained after he had been taken in charge by five postoffice inspectors held for 24 hours *incommunicado* and had been compelled to sleep in the room with one of the inspectors, and after they told him that they believed him guilty and had evidence which made it look bad for him, etc. The facts in this case so nearly resemble those in the instant case, except for the comparatively brief time the defendant in the Purpura case was held incommunicado and questioned by the officers, that it is thought best to set them out in full as given in the official statement of facts.

> "However, another investigation was instituted about October 18th, by G. G. Himmelwright, James B. Robertson, John S. Lemen, W. Chambers, and W. D. Kahn. These were well-trained inspectors of long experience. On the morning of the 18th, just as the defendant was entering the post office building in Norfolk, Inspector Kahn, one of the five named, requested Purpura to accompany him to the office of Inspector Himmelwright about 11 o'clock Friday morning, October 18th, and was detained continuously in the presence of these inspectors until the following day at or about the same time. Mr. Himmelwright, testifying for the government, says:
>
> " 'Q. So for 24 hours he was in charge of post office inspectors? A. I do not know the number of hours, but approximately, yes. I would say from between 11 and 12

o'clock on the morning of the 18th until about the same time the next day. Q. And spent the night with them? A. Yes; with Post Office Inspector Kahn, I think.' Inspector Robertson, testifying on behalf of the Government, states: 'I recollect that distinctly, some time during the afternoon, the boy remarked that he had not had anything to eat; I think he said he had not had his breakfast.'

"It appears that, in the course of the interview between the inspectors and the defendant on the 18th of October, he made a written statement denying the knowledge of the package, but after making this statement he was not permitted to return home; the reason assigned by the inspectors being that they desired to interview Mr. Casper and his daughter, whose names had been mentioned in the affidavit the defendant had made before the inspectors on the 18th, and that they did not desire him to depart until they could be interviewed. On the early morning of the 19th of October, while the defendant was dressing in the room with Inspector Kahn, which room they had both occupied at the Neddo Hotel, the subject of the package was again brought up by Mr. Kahn, who testified as follows: 'In the room, before I left, while we were dressing, I said to Purpura: "Miss Casper has contradicted every statement practically which you have made in your affidavit to-day, and which puts you in a pretty bad light. While you have denied any gift to her, she has stated to us that you had bought her a ring,

a plush dress, suit, and trunk, and various articles of clothing."

"This conversation took place before breakfast on the morning of the 19th, and the same witness proceeds to testify as follows to the subsequent occurrences: 'Q. You had her written statement denying the statements Purpura had made to you? A. Yes, sir. That was about all that was said; that it looks pretty bad; and when we got him in the room we sat possibly 15 minutes, not much more than that. Robertson, Himmelwright, and he and I were there. He asked me to step outside. I stepped out of the door, and a little to the side of the door, and we talked. He first said, "Can I withdraw that statement I made yesterday?" I said, "No; you cannot withdraw it, but you can make any additional statement you wish to make." That was the affidavit he had made before Lemen and Robertson on the 18th. I told him that I was convinced that he had stolen this package, and about this way, and he said, "Yes; I know I did it; I hate like the devil to admit it."

"The defendant and the witness then returned to Mr. Himmelwright's office, and the statement which was relied upon by the Government was then written out by Inspector Chambers, with various suggestions from Inspector Kahn. Inspector Kahn, in testifying, said: 'He showed no objection whatever to writing the statement. He resented nothing that we did' " (p. 474).

The case was reversed on account of the confession obtained under the foregoing circumstances.

Pritchard, J., reading the unanimous opinion of the court after citing 2 Hawkin, Pleas of the Crown, and Russell on Crimes, said:

> "The case of *Bram v. United States,* 168 U. S., 532, 18 Sup. Ct., 183, 42 L. Ed. 568, is very much in point—indeed, we think it is practically on all fours with the case at bar" (p. 476).

The court proceeds to state the facts in the Bram case and the holding of this honorable tribunal therein and refers to the case of *Sorenson v. United States,* 143 Fed., 820. The court then summarizes its holding in the case as follows:

> "In this instance, as we have stated, the testimony shows that defendant for a period of almost 24 hours, excluding the time he was asleep, was continuously plied with questions by these five inspectors and all manner of questions propounded to him about the circumstances under which the package in question was lost. It further appears that he was given no rest during this period, except when asleep; that he endeavored to communicate with friends for the purpose of employing counsel, and that he spent the night at the hotel under protest.
>
> "Under the circumstances, according to the testimony of the inspectors, we think this alleged confession is clearly inadmissible * * *" (p. 477).[1]

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(1) Prof. Wigmore comments on this case as follows: "1919, *Purpura v. U. S.*, 4th C. C. A., 262 Fed., 473 (larceny by a post office employee; 'the case of *Bram v. U. S.* * * * is practically on all

In the following Federal cases among others the case of *United States v. Bram* has been cited and followed:

Sorenson v. United States (1906), Circuit Court of Appeals, Eighth Circuit, 143 Federal Reporter, 820.

The defendants were convicted for the burglary of the post office. Various confessions introduced on behalf of the Government. The court in the matter of authorities confined itself almost entirely to the Bram case, saying:

> "The learned, exhaustive, and authoritative declaration of the rule upon this subject and of the appropriate practice in its application, which is found in the opinion of the Supreme Court delivered by Mr. Justice White, in *Bram v. U. S.*, 168 U. S., 532, 18 Sup. Ct., 183, 42 L. Ed., 568, renders any further discussion of the law of this case futile. A few excerpts from that opinion may be instructive" (p. 823).

* * * * * * *

After various quotations from the *Bram* case the opinion concludes:

> "The confessions in the case before this court were made to an inspector while the defendants were prisoners under his con-

fours with the case at bar;' it was then nearly twenty-five years since the Bram decision; how much longer will that misguided and unrepudiated opinion continue to cloud the reputation of the Federal Supreme Court?)." (Wigmore on Evidence, 2d Edition, Sec. 832, Note 1, p. 157.)

trol. He stated to one of them that he had an absolutely good case against him, and to both that the thing for them to do was to plead guilty and to throw themselves on the mercy of the court, and the matter would probably be overlooked in the State court. Tried by the decision of the Supreme Court in Bram's Case, either of these statements was 'legally sufficient to engender in the mind of the accused hope or fear in respect of the crime charged,' and each of them rendered the subsequent confession involuntary and inadmissible in evidence" (p. 824).

United States v. Armour & Co., District Court, N. D. Illinois, 1906, 142 Fed., 808, at 825.

Smith v. Township of Au Gres, Michigan, 1906, Circuit Court of Appeals, Sixth Circuit, 150 Fed., 257, at 264.

United States v. Wilson et al., 1908, Circuit Court, S. D. New York, 163 Fed., 338, at 339.

Harold v. Territory of Oklahoma, 1909, Circuit Court of Appeals, Eighth Circuit, 169 Fed., 47, at 48.

Hauger v. United States, 1909, Circuit Court of Appeals, 4th Circuit, 173 Federal, 54, at 58.

Shaw v. United States, 1910, Circuit Court of Appeals, Sixth Circuit, 180 Fed., 348, at 355.

Mangum v. United States, 1923, Circuit Court of Appeals, Ninth Circuit, 289 Federal, 213.

In two Federal cases, *United States v. Bram* has been distinguished.

Fitter v. United States, 1919, Circuit Court of Appeals, Second Circuit, 258 Federal Reporter, 567.

Murphy v. United States, 1923, Circuit Court of Appeals, Seventh Circuit, 285 Federal Reporter, 801.

State Cases.

People v. Brockett (1917), 195 Michigan, 169:

Defendant was convicted of assault with intent to rob, being armed with a dangerous weapon. Defendant who was 19 years old and who had never been arrested before was arrested on a Tuesday and "put in a cell, the floor of which was cement, and the only furniture in it was a stool" and kept there until "Thursday about noon," meanwhile being frequently taken to the office of the chief of police for examination. The chief of police himself testified:

> "I asked this boy questions a number of times. I would keep asking him questions. I don't remember just how I asked certain questions. In our method we have to ask questions if we want to get the truth out of them" (p. 172).

Defendant was then taken to the office of the chief of police and in the presence of a number of

officials questioned, questions and answers being taken down and signed and sworn to by him. This sworn statement recited that it was made of his free will and not in response to promises, etc. Defendant on the other hand testified he was told by an officer that he "would get clear if I (he) told the truth." Without reference to the conflict of evidence as to any specific promise the court said:

> "A careful reading of the record in this case has satisfied us that the so-called confession of the defendant should not have been received in evidence; or if received in evidence in the first instance, after it had appeared by the uncontradicted testimony of the defendant that he had been confined in the manner testified to by him for the length of time there stated, and had been persistently importuned by the officers to make a confession, the same should have been withdrawn from the consideration of the jury. We need only to cite our own cases upon this point. *Flagg v. People,* 40 Mich., 706; *People v. Wolcott,* 51 Mich., 612 (17 N. W., 78); *People v. Stewart,* 75 Mich., 21 (42 N. W., 662); *People v. Clarke,* 105 Mich., 169 (62 N. W., 1117); *People v. Prestidge,* 182 Mich., 80 (148 N. S., 347); *People v. McClintic,* 193 Mich., 589 (160 N. W., 461)" (p. 176).

The court then proceeds to quote from the Mississippi case of *Ammons v. State,* and it is believed that despite the fact that *Ammons v. State* was a case where the prisoner was confined in a literal

"sweat box," which was kept entirely dark, in addition to being subjected to "importunate questioning" (charge of Judge Gould in the instant case, R., p. 173), as in the instant case, the language of the court in the Mississippi case and in particular its waiving the requirement of technical threats and promises when the same result is reached by other means is indeed "instructive," as the learned court in the *Brockett* case remarks. The reference to and quotation of the *Ammons* case in the *Brockett* case is as follows:

> "An instructive case is that of *Ammons v. State*, 80 Miss., 592 (32 South., 9; 92 Am. St. Rep., 607), reported with very ample notes in 18 L. R. A. (n. s.) at page 768. It was there held distinctly that the confession by a prisoner after being confined for several days in a 'sweat box' is not admissible in evidence against him, although no threats or offers of reward were made to coerce, and he was merely told that it would be better for him to tell the truth. After describing the sweat box, the court said:
>
> " 'The prisoner was allowed no communication whatever with human beings. Occasionally the officer, who had put him there, would appear, and interrogate him about the crime charged against him. To the credit of our advanced civilization and humanity it must be said that neither the thumbscrew nor the wooden boot was used to extort a confession. The efficacy of the sweat box was the sole reliance. * * * The officer, to his credit, says he did not threaten his

prisoner, that he held out no reward to him, and did not coerce him. Everything was "free and voluntary." He was perfectly honest and frank in his testimony, this officer was. He was intelligent, and well up in the law as applied to such cases, and nothing would have tempted him, we assume, to violate any technical requirement of a valid confession—no threats, no hope of reward, no assurance that it would be better for the prisoner to confess. He did tell him, however, "that it would be best for him to do what was right," and that "it would be better for him to tell the truth." In fact, this was the general custom in the moral treatment of these sweat box patients, since this officer says, "I always tell them it would be better for them to tell the truth, but never hold out any inducement to them." He says, in regard to the patient, Ammons, "I went to see this boy every day, and talked to him about the case, and told him it would be better for him to tell the truth; tell everything he knew about the case." This sweat box seems to be a permanent institution, invented and used to gently persuade all accused persons to voluntarily tell the truth. Whenever they do tell the truth—that is, confess guilt of the crime—they are let out of the sweat box. Speaking of this apartment, and the habit as to prisoners generally, this officer says: "We put them in there (the sweat box) when they don't tell me what I think they ought to." This is refreshing. The confession was not competent to be received as evidence. 6 Am. & Eng. Enc. of

Law, p. 531, note 3; *Id.*, p. 550, note 7; *Hamilton v. State*, 77 Miss., 675 (27 South., 606); *Simon v. State*, 37 Miss., 288. Defendant, unless demented, understood that the statement wanted was confession, and this only meant release from this "black hole of Calcutta." Such proceedings as this record discloses cannot be too strongly denounced. They violate every principle of law, reason, humanity and personal right. They restore the barbarity of ancient and medieval methods. They obstruct, instead of advance, the proper ascertainment of truth. It is far from the duty of an officer to extort confession by punishment.'

"The case was reversed upon that sole ground. That such confessions are obtained by duress, see *State v. Miller*, 61 Wash., 125 (111 Pac., 1053), reported with notes in 1912 B, Am. & Eng. Ann. Cas., 1053; *People v. Loper*, 159 Cal., 6 (112 Pac., 720), reported in 1912 B, Am. & Eng. Ann. Cas., 1193; *Commonwealth v. McClanahan*, 153 Ky., 412 (155 S. W., 1131), reported in 1915 C. Am. & Eng. Ann. Cas., 132." (*People v. Brockett*, 195 Mich., 169, at pages 177-179.)

State v. Thomas (1913), 250 Mo., 189:

This case is inserted notwithstanding the fact that the court finally held a confession, obtained after the defendant had been arrested and held thirty-six hours, during which time he had been repeatedly questioned by the police, was not inadmissible, no specifiic threat or promise having been

established, because of the language held by the court and the clear intimation that prolonged questioning under arrest without more might render a confession thereby obtained inadmissible. The case was as follows:

Defendant was convicted of murder in the first degree. A written confession of the defendant was admitted over his objection. Obtained by the chief of police of Kansas City, who testified that he made no threats, offered no violence, and held out no hope of immunity or leniency, but admonished him that

> "if there were others implicated in the killing of Johnson not to bear all the blame himself but give the name of the other guilty parties" (p. 205).
>
> "The testimony of Chief Griffin showed that defendant had been all of one night and part of two days in the custody of Captain Casey" (206).
>
> * * * * *
>
> "Captain Casey questioned defendant twice before taking him to Chief Griffin" (208).

Griffin testified that "he had to call defendant three or four times."

The court held:

> "When the youth of the defendant is considered, the fact that he had not previously been arrested, and the amount of interrogating required to bring about the confession, we are almost justified in holding, as a matter of law, that the confession was not voluntary" (p. 210).

Nevertheless the court finally upheld the admission of the evidence, saying:

> "However, officers in trying to secure confessions or admissions from a party suspected of crime should not forget that they have no legal right to *compel* a person under arrest to make any statement whatever—that no one can be compelled to furnish evidence against himself, and where the interrogatories are persisted in to an unreasonable extent, thereby producing mental anguish on the part of the accused, the confession or admission thus obtained should be wholly rejected as involuntary, the same as if it had been obtained by the infliction of physical torture" (p. 211).
>
> "In discussing this subject Mr. Underhill in his new work on Criminal Evidence, section 140, says:
>
> " 'The practice of eliciting a confession by putting question after question to the accused is clearly not conducive to the procurement of truth, and the mode in which the confession was elicited may always be considered by the jury to determine whether they shall believe it.
>
> " 'This is well illustrated by the methods employed by police officers and others in practicing upon the accused after his arrest what is known in police circles as the "third degree." This usually consists in subjecting the accused, after his arrest and while in custody, to a continuous and rigid examination accompanied with intimidation by threats and other means. The length of

this process and the manner of its application depend largely upon the character of the official who administers it and upon that of the accused to whom it is administered.

"'Where, on the one hand, the police official is sufficiently hardened and brutalized by his past experience and the accused is a determined and courageous person, it is likely to continue for some lengthy period without results, but where the accused is weak and nervous or feeble in mind or body, the carrying out of this method of modern torture will generally result in producing statements in answer to leading questions which can readily be twisted into a confession.

"'The worthlessness as evidence of such statements needs but to be stated in order to be appreciated. Their probative force, or rather lack of force, is well recognized by all who have had any experience of human nature'" (pp. 212, 213).

"The fact that defendant in this case was a boy not over seventeen years of age, and was subjected to almost continuous interrogatories during twenty-four hours was almost sufficient to justify a court in rejecting the statement and admissions as involuntary. The obnoxious practice of extorting confessions from prisoners suspected of crime has become so common that some States have enacted statutes declaring such confessions inadmissible unless the defendant be first warned that they will be used to convict him of crime (*Parker v. The State*, 46 Tex. Crim., 461; l. c., 470) (214).

The case was, however, reversed

> "For the error of the trial court in improperly commenting upon the written confession of defendant in its instruction, * * * " (p. 218).

State v. Powell (1914), 258 Mo., 239:

In this case, the Supreme Court of Missouri applied the doctrine enunciated in *State v. Thomas* in a case where defendant was sweated for about seven hours, in the course of which the police officers said that it would be "best for him to tell the truth."

Defendant, a colored man 24 years of age, was convicted of murder in the first degree. At the trial a signed confession of the defendant was admitted over his objection and exception. The circumstances under which this confession was obtained are stated by the court as follows:

> "He was arrested and locked up the day following the robbery, and on the second day was taken to the office of Edward B. Stone, Captain of Police, and questioned by Captain Stone and eight other police officers and detectives regarding his knowledge of and complicity in the robbery and murder.
>
> "With one exception the witnesses agree that the interrogation of defendant began about two p. m. Sunday afternoon and continued until eleven p. m. that night with very slight intermissions. Defendant was interrogated alternately by the nine officers and detectives, and at eleven p. m. consented

> to confess. His confession, written on a typewritter, was completed and signed between twelve and one a. m. that night" (p. 246).
>
> * * * * * * *
>
> "Captain Stone, upon cross-examination, further stated that he had to draw the confession from defendant piece by piece; that he questioned him at length and severely about other parties implicated in the crime. Asked if he had to 'worm' the confession out of defendant, witness Stone replied: 'I had to work hard.' Asked whether he told defendant that it would help him to tell the truth, Captain Stone replied that he did so several times. He also stated that defendant did not seem to be nervous, but that 'he appeared to be tired and worn out from the strain' " (p. 248).

(It would seem that as in the instant case Captain Stone found that obtaining the defendant's confession was "like working low-content gold ore" (R., p. 100).

Held, that the confession should have been excluded as involuntary. The court comments upon the language of the confession as follows:

> "The last paragraph of the confession, to-wit, 'I make this statement of my own free will, without any threats or promises being made and knowing that it will be used against me if I am prosecuted,' looks rather suspicious. It is highly improbable that

such a clause would have been inserted if some hope had not been directly or indirectly held out to defendant that he would not be prosecuted.

"The officers testified that defendant dictated all of the confession, except the first two or three lines thereof, but this concluding paragraph is so unusual and so unlike the other language used by defendant in giving his testimony, I am impressed with the idea that it was suggested by some of the officers in an effort to have the defendant brand as voluntary a confession which is not entitled to be so regarded" (p. 250).

This case came a second time before the Supreme Court of Missouri in 1915, 266 Mo., 100. The State again introduced the defendant's confession on the trial on the theory that a somewhat different showing had been made as to the circumstances under which it was obtained. It was again admitted by the lower court. The Supreme Court of Missouri held, however, that:

"For a casual reading of the present record discloses that the identical vices for which we before held the alleged confession to be inadmissible because not voluntary, inure in the one before us. Indeed, it is fairly patent that if legal defects, arising from matters of affirmative proof, existed before in laying the foundation of voluntariness in order to render the confession admissible in the former trial, these defects could not be sworn away upon this trial,

absent perjury. Nor in our view have they been so sworn away. Error before arose from the substantial fact that nine officers, for the most part police, collectively, or individually, or in pairs or trios, 'sweated' defendant continuously from two o'clock in the afternoon till one o'clock next morning, at which time, after the police captain Stone and others of the nine apparently in Stone's presence, had told defendant it would 'be best for him to tell the truth,' he made and signed the alleged confession in evidence. Upon this record, as upon the former, we do not credit the statements of the defendant that he was beaten and maltreated; for on this point he is overwhelmed and utterly discredited by countervailing testimony. But here upon the instant record the other identical infirmities of foundation appear affirmatively from the testimony of witnesses for the State" (pp. 106-107).

People v. Loper (1910), 159 Cal., 6:

Defendant was convicted of murder after examination by the sheriff, district attorney and others, which his counsel characterizes as "a relentless sweating process" (p. 14). This process appears to have been transcribed verbatim.

"After the searching inquiry of the sheriff, district attorney, and deputy district attorney had closed, defendant was locked up in solitary confinement until the following morning, when he informed the sheriff that he desired to tell everything" (p. 15).

Extended quotations from the examination of the defendant are given on pages 15 to 17, which make very interesting reading in the light of the record in this case. The court held that the admission of the confession was reversible error. In the course of its opinion it refers to the Bram case as follows:

> "In *Bram v. United States,* 168 U. S., 532 [18 Sup. Ct., 183], the leading authorities upon the subject of confessions are collated and discussed masterfully in the opinion of the court delivered by Mr. Justice White. In that opinion he says" (p. 18):

Here follows a long quotation from the opinion in the Bram case.[1] Professor Wigmore comments on this case as follows:

People v. Quan Gin Gow, (District Courts of Appeal) 23 Cal. App. 507.

In this case the Court held a confession involuntary and reversed the decision of the lower court although no threats were used or promises held out, because the confession was the result of continuous questioning and therefore not voluntary. The case is authority to the effect that the confession in the

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(1) Professor Wigmore comments on this case as follows: "California: 1910, *People v. Loper,* 159 Cal., 6: 112 Pac., 720 (the 'sweating process'; confession excluded; but what does the opinion mean by exhuming the historical errors of the majority opinion in *Bram v. U. S.,* and offering them as law? That case should be forgotten)*" (Wigmore on Evidence, 2nd Edition, Sec. 851, note 5, p. 199.)

present case should have been excluded simply on the ground of the continuous "importunate questioning." In the course of its opinion, the Court said:

> "The defendant, a Chinaman, was brought, while under arrest, alone, and unaccompanied by friends or counsel, into the office of the detectives and there subjected to a vigorous oral examination. At first he refused to answer any questions and his silence continued, for from 5 to 10 minutes. The questions were persisted in; the same interrogatory designed to draw from him the admission that he had fired the shot that killed Chin Hoy Hing, was repeated many times. At one point he said he did not 'savey' or understand. He figited and squirmed in his chair and appeared afraid of something. Finally he gave the statement set forth in the foregoing. It seems quite clear from the evidence of the conditions which surrounded the defendant at that time that he did not desire to make a statement. While no physical force was used and neither threats nor promises were made, there can be no doubt at all but that the repeated questioning of the officers, like the constant dropping of water upon a rock, finally wore through his mental resolution to remain silent. Admittedly, his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. When did his unwillingness vanish and a desire to talk succeed it? Not after he had been given any period of time for reflection,

> for his inquisitors allowed him none. The examination was persisted in until a response was forthcoming, and under these circumstances it must be said that the responses appear to have been unwillingly made and as a direct result of continued importuning" (p. 511).

The Court then quoted at length from *United States v. Bram, supra,* and added:

> "The error of the court in admitting the confession, under the circumstances shown here, was highly prejudicial" (p. 513).

The following case, which was decided under the Kentucky "sweating statute," is included not of course as an authority on the common law as administered in the Federal courts, but as tending to show that, so far from the Bram case being "misguided" and continuing "to cloud the reputation of the Federal Supreme Court" (Wigmore on Evidence, 2nd Edition, Sec. 832, note 1, p. 157) when it "should be forgotten" (*ibid,* Sec. 851, note 5, pp. 199-200), the Bram case is not only bottomed on the authorities but is in harmony with a sound and far-seeing public policy which appeals to legislators as well as judges.

Commonwealth v. McClanahan (1913), 153 Ky., 412:

This case was decided under the Kentucky sweating statute which is quoted by the court in its opinion as follows:

"(1) That what is commonly known as 'sweating' is hereby defined to be the questioning of a person in custody charged with crime in an attempt to obtain information from him concerning his connection with the crime or knowledge thereof, after he has been arrested and in custody, as stated, by plying him with questions or by threats or other wrongful means, extorting from him information to be used against him as testimony upon his trial for such alleged crime.

"(2) It shall be unlawful for any sheriff, jailer, marshal, constable, policeman or other officer, or any peace officer, or any person having in his custody any person charged with crime, to sweat such person or permit any other person so to do, while such prisoner is in charge of such officer or in the custody of the law, charged with an offense.

"(3) That no confession obtained by means of sweating as defined herein, shall be permitted as evidence in any court of law in this State, but shall be deemed to have been obtained by duress, if it be shown that such confession was made after the arrest of the party charged with crime, and while he was in the custody of the law" (p. 415).

The defendant was convicted of housebreaking but the lower court excluded evidence of a confession made by him, and the State took an appeal against this ruling.

It appears from the opinion of the court that

after the defendant's arrest he was questioned by the officers of the law in the detectives' room; that when defendant made certain statements he was confronted with the contradiction of confederates and cross-examined, and that he broke down under this cross-examination and confessed. No promise or threats appear to have been used. Held that the Kentucky sweating act was constitutional and reasonable; that the examination whereby the confession in question was obtained came within the inhibition of the statute. The court observes on this opinion:

> "It will be observed that the 'sweating' prohibited by the act may be done by the mere questioning of the person under arrest charged with crime concerning his connection therewith or knowledge thereof, if it be done for the purpose of extorting from him (*i. e.*, inducing an unwilling or involuntary giving of) information to be used against him on his trial for such alleged crime. In enacting this statute it was the purpose of the legislature to strike a blow at the modern methods, less harsh than threats, intimidation or promises of benefits to be conferred, condemned by the common law, that are employed by detectives and arresting officers to obtain information and confessions from those suspected of guilt or implicated in crime.
>
> "Just as three centuries ago the use of the rack and other tortures for compelling confessions of guilt were abolished in England,

> there is now a tendency to do away with the 'sweat-box' and other like methods that are calculated to make such confessions, other than spontaneous" (p. 416).

The court holds that the lower court rightly excluded the confession in question.

3. *These General Considerations Apply to All the Confessions.*

If it be suggested, as in the Government's brief below, that even if the earlier confessions were excluded as involuntary, still the written confession signed on February 12th was voluntary and sufficient to convict, it is submitted that the answer is two-fold: *First,* there was one general situation existing with a cumulative effect; and, *second,* it is impossible to tell the weight attached by the jury to the various confessions.

First, during the six days of questioning ending Thursday, February 6th, petitioner had withstood all efforts to force a confession as to a crime of which he repeatedly maintained his innocence; on Friday, February 7th, the first confession, in regard to the man who went to the bank, was obtained in the manner already outlined; this was used as a wedge the following night, Saturday, February 8th, at the Mission House, to drag from the ill petitioner in the course of the all-night coercion, the alleged confession in regard to the handwriting on the check stub (R., pp. 98-99); the next evening, Sun-

day, February 9th, in his cell at the precinct station, responding to the threats, inducements and promises of Grant, and realizing therefrom and from the unremitting efforts of the police for the past eight days the hopelessness of surcease unless he implicated himself, he confessed, in direct response to Grant's specific statements and the representations (whatever they were) of K. S. Wang, that he was present at the killing, and even then, fighting still to obtain a way out, said Chen did it; the next morning, Monday, February 10th, having again been taken to the Mission House, still confronted with questioning officers, accused pointblank of having put Chen in his own place, and thus impelled by the inference of guilt resulting from silence (referred to in the *Bram* case) to make a further statement, the influence of the previous days being thus continued, pushing him back from point to point, wholly and indisputably against his own volition, and being already involved by the confession obtained on Sunday, he confessed that he killed Wu, and explained in answer to questions how it was done based upon the suggestions of the officers and the continuous "rehashing" of the case. The full confession, which the police had determined to extort from him had then and in such manner obtained, and the next morning, Tuesday, the 11th, at the police station, it was merely reduced to question and answer form, stenographically recorded, "as he had given it the day before" (R., p. 70); on Wednesday, February 12, at the

jail, the petitioner not being well enough to read it, the confession was read to him, and he said it was "practically his story" (R., p. 70), and signed it. The next day Dr. Gannon found him worn and emaciated in his cell, and ordered him removed to the Red Cross room. It is clear that the last two steps of this continuous campaign, that is, the reducing to writing and signing, were not necessary for the purposes of the police, and were resorted to merely to facilitate the proof on the trial. It is equally clear that all the confessions were the result of the efforts and suggestions of the police officials. Their influence was never removed, and in the nature of things the longer it continued the weaker the resistance became, until at the end the petitioner was helpless. There can be no question, as a matter of law, that when once an improper influence has been exerted with the view and for the purpose of inducing or extorting a confession it must be shown to have been removed before any subsequent confession may be said to be voluntary.

Second, all the separate confessions having been offered before the jury as material evidence to secure a conviction, and being admissible only on that theory, if any of them was involuntary, prejudicial error resulted from its admission. To illustrate this, the jury were entitled to believe the statement of petitioner made on the witness stand, where (R., p. 154), in reply to the court's suggestion before the jury that he had so signed his death warrant (petitioner states), that he had signed it

not because it was true but because he would let them, the police, go ahead and find out if it were true, indicating his belief that the statements in the confession had to be proved to be true by independent evidence; thus the jury on this one ground may have disregarded the written confession, even if it could by any possibility be said to be voluntary, and on the further ground that it was contradicted in various respects by the physical facts in the record; yet they had the right to convict him because of any one, or more, of the oral confessions. On what evidence the jury based its conviction, no one can say.

(B) Specific Statements Implying Threats or Promises Were Made to Petitioner by Persons in Authority.

It is now desired to direct the attention of this tribunal to certain considerations growing out of specific statements made to petitioner on the all-important occasion in the police station late Sunday afternoon after petitioner had been charged with murder. This is the occasion as to which Inspector Grant was able, particularly on his cross-examination, to throw the most light upon the methods by which the prisoner's confession was obtained. Being asked similar questions in regard to another occasion, he responded, "It is one of the hardest things for me to do, to remember those conversations" (R., p. 84). On the occasion in ques-

tion, Inspector Grant testifies that he saw the petitioner about 6 or 7 o'clock in the evening, this being the day after the all-night questioning at the Mission House. Grant, Burlingame and Kelly, all detectives, and a Chinese named K. S. Wang, were there, and "there is where this man said that he wanted to tell his story, and he told me about seeing all three of these men killed" (R., p. 80).

> "Sunday evening at the mission house[1] witness was appealing to the good side of his nature; asked him several times to tell witness the truth about this thing; finally said to him, 'If you are guilty and your brother is innocent, now is the time to tell it; I want to know;' then it was he admitted seeing all three men killed; his brother was then in a cell in the back part of the building; * * * appealed to the better side of his nature; 'told him that things looked pretty black for him, that we had talked this thing over and the developments showed me that he knew more about the crime than he was telling, and I asked him for the truth;' told him 'the investigation so far looks pretty black for you; tell me the truth;' * * * went over practically and rehashed all the case as far as they had learned about it and related all the circumstances against him; told him a lot of things, but never offered any inducement, because witness has had too much experience in that line.
>
> "Q. And this was what you meant by saying that you appealed to the better side of

(1) Should be "station house." See R., p. 89, 102, etc.

his nature—by telling him that the investigation looked awfully black and *that he had better tell you the truth?*

"A. Yes; I thought if he told the truth about it, it would be the proper thing for him to do under the circumstances" (R., pp. 80-81.) (Italics supplied).

In support of the general proposition that these appeals to the prisoner's better nature, combined with these attempts to convince him that "things look pretty black for him," and that the officers were convinced he was guilty and was concealing his crime, rendered the petitioner's confessions thereby obtained inadmissible, the following passages from the opinion of this Honorable Tribunal in the *Bram* case are invoked:

> "What further was said by the detective? 'Now look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight result-

> ing from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to be removed by speaking naturally imported a suggestion of some benefit as to the crime and its punishment as arising from making a statement." (*Bram v. United States,* 168 U. S., 532, at pp. 564-565.)

And again a little earlier in its opinion in the Bram case this honorable tribunal uses language which it is submitted is fairly applicable to defendant's situation at the Police Station Sunday afternoon when in response to Inspector Grant's "importunate questioning", to use the language of the learned trial court in this case (R., 173) the defendant confessed that he was present at the scene of the crime and saw one Chen commit the murders. The passage in question is as follows:

> "* * * To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he has seen him commit the offence, to make this statement to him under circumstances which call imperatively for an admission or denial and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then to use the denial made by the per-

son so situated as a confession, because of the form in which the denial is made, is not only to compel the reply but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of." (*Bram v. United States*, 168 U. S. 564.)

But without resorting to these general considerations, it is submitted that the language above quoted includes at least two specific statements, one of which renders the resulting confession inadmissible under almost all the authorities, and the other renders it inadmissible according to the holdings of most courts, including this Honorable Tribunal.

Reference is made first to the statement:

> "If you are guilty and your brother is innocent, now is the time to tell it; I want to know" (R., p. 80).

Short of an absolute and direct promise or threat, how could a promise or a threat by a person in authority be more clearly implied than by this statement under the circumstances in which it was made?

The other is Inspector Grant's admission under cross-examination that he told petitioner he had better tell the truth:

> "Q. And this was what you meant by saying * * * that he *had better tell you the truth?*
>
> "A. Yes; I thought if he told the truth about it, it would be the proper thing for him to do under the circumstances" (R., p. 81.) (Italics supplied).

The Government contends in its brief below (p. 32) that the record does not show that Grant said that it was "better" for petitioner to tell the truth; merely that he told him "to tell the truth". But it is submitted that Inspector Grant's examination and cross-examination on this point taken in their entirety show that both technically and substantially Grant admitted that he told petitioner that it was "better to tell the truth." The Government's brief inveighs against the supposed "talismanic effect" (p. 19) of these words, and submits, "in the face of authority" (p. 19), that they are insufficient to exclude the confession which follows. The Government frankly admits, however, that

> "apparently this court (*i. e.*, the Court of Appeals of the District of Columbia) in *West v. United States,* 20 App. D. C., has held that these words alone were sufficient to render a confession inadmissible" (pp. 33-34).

Not only is this admission fully borne out by the West case, but it is further true that the Court of

Appeals, in the *West* case, reluctantly yielded the view which it had previously expressed in *Hardy v. United States,* 3 App. D. C., 35, decided in 1893 (where it held that the promise, "we would see what we could do for him," did not render a confession involuntary), because, as it frankly said, it was "constrained by the authority of the Supreme Court of the United States in the case of *Bram v. United States.*". (*West v. United States,* 20 App. D. C., 347, at p. 351.)

The pertinent passage of the opinion of the Court of Appeals in the *West* case reads in full as follows:

> "We are constrained by the authority of the Supreme Court of the United States in the case of *Bram v. United States,* 168 U. S., 532, to hold that the confession here was involuntary, and should not have been admitted in evidence. In various cases therein cited with approval and sustained by the majority of the court as stating the correct doctrine on the subject, the words used by the officers of the law to the prisoners in their custody to superinduce a confession were almost identical with those employed in this case. In *Rex v. Griffin,* Russ. & Ryl., 151, they were, 'It will be better for you to confess;" in *Rex v. Kingston,* 4 Car. & P., 387, 'You are under suspicion and you had better tell all you know;' in *Rex v. Garner,* 1 Den. C. C., 329, 'It will be better for you to speak out;' in *People v. Barric,* 49 Cal., 342, 'It will be better for you to make a full disclosure;' in *People v. Wolcott,* 51 Mich.,

612, 'It will be better for you to confess;' in *Commonwealth v. Myers,* 160 Mass., 530, 'You had better tell the truth;' in *Vaughan v. Commonwealth,* 17 Gratt., 576, 'You had as well tell all about it.' Some of these words of exhortation to a confession would seem to have been innocent enough; and yet they were each and all of them held sufficient to vitiate the confessions made in pursuance of them, and to relegate such confessions to the category of confessions involuntary in law. And if these words of inducement were objectionable, assuredly those of the present case are no less so. They are of the same precise tenor and effect." (*West v. United States,* 20 App. D. C., 347, at pp. 351-352.)

The excerpts from the opinion of this honorable court in the Bram case, summarizing with approval the decisions to which reference was made by the Court of Appeals in the West case, are as follows:

"In the cases following, statements made by a prisoner were held inadmissible, because induced by the language set out in each case: In *Rex v. Griffin* (1809), Russ. & Ry., 151, telling the prisoner that it would be better for him to confess; in *Rex v. Jones* (1809), Russ. & Ry., 152, the prosecutor saying to the accused that he only wanted his money, and if the prisoner gave him that he might go to the devil, if he pleased; in *Rex v. Kingston* (1830), 4 Car. & P., 387, saying to the accused, 'you are under suspicion of this, and you had better tell all you know';

in *Rex c. Enoch and Pulley* (1833), 5 Car. & P., 539, saying: 'You had better tell the truth or it will lie upon you, and the man go free'; in *Rex. v. Mills* (1833), 6 Car. & P., 146, saying: 'It is no use for you to deny it, for there is the man and boy who will swear they saw you do it'; in *Sherrington's case* (1838), 2 Lewin C. C., 123, saying: 'There is no doubt thou wilt be found guilty, it will be better for you if you will confess'; in *Rex v. Thomas* (1833), 6 Car. & P., 353, saying: 'You had better split, and not suffer for all of them'; in *Rex v. Simpson* (1834), 1 Moody, 410, and Ry. & Mood., 410, repeated importunities by neighbors and relatives of the prosecutor, coupled with assurances to the suspected person that it would be a good deal worse for her if she did not, and that it would be better for her if she did confess; in *Rex v. Upchurch* (1836), 1 Moody, 465, saying: 'If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if William H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you. Pray, tell me if you did it'; in *Reg. v. Croydon* (1846), 2 Cox C. C., 67, saying: 'I dare say you had a hand in it; you may as well tell me all about it'; in *Reg. v. Garner* (1848), 1 Den. C. C,. 329, saying: 'It will be better for you to speak out.'" *Bram v. United States,* 168 U. S., 532 at 552-3).

"We come then to the American authorities. * * *

"In the following cases, the language in each mentioned, was held to be an inducement sufficient to exclude a confession or statement made in consequence thereof: In *Kelly v. State* (1882), 72 Alabama, 244, saying to the prisoner, 'You have got your foot in it, and somebody else was with you; now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth'; in *People v. Barrie,* 49 California, 342, saying to the accused, 'It will be better for you to make a full disclosure'; in *People v. Thompson* (1890), 84 California, 598, 605, saying to the accused, 'I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way'; in *Beery v. United States* (1893), 2 Colorado, 186, 188, 203, advising the prisoner to make full restitution, and saying, 'If you do so it will go easy with you; it will be better for you to confess; the door of mercy is open and that of justice closed'; and threatening to arrest the accused and expose his family if he did not confess; in *State v. Bostick* (1845), 4 Harr. (Del.), 563, saying to one suspected of crime, 'The suspicion is general against you, and you had as well tell all about it, the prosecution will be no greater, I don't expect to do anything with you; I am going to send you home to your mother'; in *Green v. State* (1891), 88 Georgia, 516, saying to the accused, 'Edmund, if you know anything, it may be best for you to tell it'; or, 'Edmund,

if you know anything, go and tell it, and it may be best for you'; in *Rector v. Commonwealth* (1882), 80 Kentucky, 468, saying to the prisoner in a case of larceny, 'It will go better with you to tell where the money is, all I want is my money, and if you will tell me where it is, I will not prosecute you hard'; in *Biscoe v. State* (1887), 67 Maryland, 6, saying to the accused, 'It will be better for you to tell the truth and have no more trouble about it'; in *Commonwealth v. Nott* (1883), 135 Mass., 269, saying to the accused, 'You had better own up; I was in the place when you took it, we have got you down fine; this is not the first you have taken, we have got other things against you nearly as good as this'; in *Commonwealth v. Meyers* (1894), 160 Mass., 530, saying to the accused, 'You had better tell the truth'; in *People v. Wolcott* (1833), 51 Michigan, 612, saying to the accused, 'It will be better for you to confess'; in *Territory v. Underwood* (1888), 8 Montana, 131, saying to the prisoner that it would be better to tell the prosecuting witness all about it, and that the officer thought the prosecuting witness would withdraw the prosecution or make it as light as possible; in *State v. York* (1858), 37 N. H., 175, saying to one under arrest immediately before a confession, 'If you are guilty you had better own it'; in *People v. Phillips* (1870), 42 N. Y., 200, saying to the prisoner, 'The best you can do is to own up; it will be better for you'; in *State v. Whitfield* (1874), 70 N. C., 356, saying to the accused, 'I believe you are guilty; if you are you had bet-

> ter say so; if you are not you had better say that'; in *State v. Drake* (1893), 113 N. C., 624, saying to the prisoner, 'If you are guilty, I would advise you to make an honest confession; it might be easier for you. It is plain against you;' in *Vaughan v. Commonwealth* (1867), 17 Gratt., 576, saying to the accused, 'You had as well tell all about it.'"
>
> (*Bram v. United States,* 168 U. S., 532 at 557, 559-561.)

Yet, in the instant case, although the point was elaborately argued in petitioner's brief, the Court of Appeals overrules the assignment of error based on Inspector Grant's statement that it would be better for the petitioner to tell the truth without even noticing it except insofar as it may be said to be noticed by the general statement that "the other errors assigned are not of sufficient importance to merit consideration" (R., p. 187).

Petitioner respectfully urges that there is no material difference between the situation dealt with in this assignment of error and that sustained in the *West* case, unless it be the difference (which has become immaterial in this case, through the granting of the writ), that since the decision in the *West* case, the United States Judicial Code has been so amended as to take away from the defendant in a criminal case the *right of writ of error* to this Honorable Tribunal, thus leaving petitioner without remedy except on writ of certiorari, the issuance of which is discretionary.

The failure of the learned Court of Appeals to discuss this point naturally relieved that court of any necessity for considering it either in the light of the ruling of this honorable tribunal in the Bram case or in the light of the doctrine of Prof. Wigmore, which the learned Court of Appeals has apparently elected to follow; that there is no doubt, however, as to the contradiction on this point between the Bram case, which the learned Court of Appeals was bound to follow, and Prof. Wigmore's doctrine, which the learned Court of Appeals did follow, is apparent from Prof. Wigmore's own frank statements.

In the course of his discussion of the subject of confessions, he comes to the consideration of the subject of confessions induced by "Advice that 'it would be better to tell the truth,' or its equivalent," in Section 832. After expressing the opinion that,

> "on principle, the advice by any person whatever that it would be better to tell *the truth* cannot possibly vitiate the confession, since by hypothesis the worst that it can evoke is the truth, and there is thus no risk of accepting a false confession."

the learned author goes on to remark,

> "Nevertheless, judges have been found with such extraordinary scrupulosity as to exclude confessions following such advice."

Under this statement Prof. Wigmore cites a large number of cases, among them the case of *Rex v. Baldry,* as to which he says:

"Pollock, C. B., in *R. v. Baldry, supra*, distinguished between 'tell the truth,' and 'you had better tell the truth;' but this quiddity seems not to be elsewhere advanced."

and he concludes this long list of citations with the following characteristic reference to the Bram case:

"1897, *Bram v. U. S.*, 168 U. S., 532; 18 Sup., 182 (the defendant was under arrest and was called into the office of the chief of police; "'When Mr. Bram came into my office, I said to him: "Bram, we are trying to unravel this horrible mystery." I said: "Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder." He said: "He could not have seen me. Where was he?" I said: "He states he was at the wheel." "Well," he said, "he could not see me from there." I said: "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown, but," I said, "some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." He said: "Well, I think, and many others on board the ship think that Brown is the murderer; but I don't know anything about it"'"; in a labored argument, this was held improperly admitted; it is enough to say that the ruling takes its place among those which have reached the highest pitch of ir-

rationality in this subject, and have done most to reduce the law of evidence to a mass of mediæval scholasticism and to put it in a condition to favor criminals; Brewer, J., with Fuller, C. J., and Brown, J., dissent, saying "To support this contention involves a refinement of analysis which, while it may show marvellous metaphysical ability, is of little weight in practical affairs"). * * * Compare the cases cited post, sec. 838 ("You had better confess")."

Wigmore on Evidence, sec. 832, First Edition, p. 946; footnote 1, at p. 947.

The Refusal to Permit Defendant to Testify as to Conversation with K. S. Wang.

On Sunday, February 9, defendant had been held incommunicado by the police for a whole week and piled with questions day and night, and finally had been taken to the house of murder at 7 o'clock on Saturday night and grilled the entire night until he was removed to the police station at 5.20 the next morning and charged with murder. In spite of all this, the police do not even claim to have obtained, up to this time, any direct admission of guilt, anything which the Government regards as a "confession." They had merely obtained the remark about the man who went to the bank on Friday night and the disputed statement as to the handwriting on the check stub Saturday night. Sunday night they returned to the charge, re-en-

forced with the assistance of a Chinese, K. S. Wang. When defendant was on the stand, his counsel endeavored to bring out what happened, and the following ensued, as shown by the record:

"Sunday night at No. 10 station house witness met K. S. Wang. Thereupon the following ensued:

"The witness said, 'and K. S. Wang told me——'

"Mr. Laskey: I object.

"Mr. O'Shea: If the court please, we believe it is part of the circumstances surrounding the making of the confession, and we believe that if K. S. Wang made certain inducements or suggestions to this man, as the result of which this man made a statement, that that is proper.

"The Court: There is nothing to show that K. S. Wang had any authority to make any representations or take any part in the case.

"Mr. O'Shea: That may be true; but if it should appear that he was used by the police for that purpose——

"The Court: It does not appear yet.

"Mr. O'Shea: Detective Grant said, if I recollect the testimony correctly, that he did get K. S. Wang to talk to this boy.

"The Court: He said Wang talked to this defendant, but that got him to act for the police—there is no such testimony as that.

"Mr. O'Shea: I think he sent him in.

"The Court: It may be he went so far as to say he sent him in. I do not recall the exact language, the exact testimony, but there

is nothing from which you can reason he had any authority to represent the Government in this case.

"Mr. O'Shea: Very well, we make the offer to go into this conversation, and with the court's refusal to permit us to do so we take an exception.

"Which exception was duly allowed." (R., p. 144.)

It is respectfully submitted that this ruling was erroneous and vitally prejudicial to the petitioner. The practical importance of what K. S. Wang told the petitioner may be judged from the fact that immediately after petitioner's conversation with K. S. Wang, Inspector Grant was able to testify:

> "There is where this man said that he wanted to tell his story, and he told me about seeing all three of these men killed" (R., p. 80).

The circumstances under which this happened can be best approached through the medium of the testimony of Lieutenant Kelly, who was also present. He says:

> "Sunday night, February 9, about 7 or 7.30, in company with Inspector Grant and a young Chinese named K. S. Wang, from New York City, and Burlingame, witness went to No. 10 police station; Inspector Grant and Wang went into the sergeant's room and talked to defendant for a while, and then the inspector came out and left

> Wang and defendant in the room together, placing a man on the outside in the yard under the window; after some little while Wang called Inspector Grant, who went into the room with defendant, and then the inspector called Burlingame and witness into the room. After Wan had told Grant he was going to tell him about the affair, Grant said, 'Let me ask you first, were you present when the men were killed?' and defendant said, 'Yes,' and went on to relate how a Chinese named Chen had killed Wu, after Wu had killed Wong and Hsie" (R., pp. 102-3).

Grant testified concerning this incident as follows:

He saw Wan Sunday "evening about six or seven; the witness, a Chinaman named K. S. Wang, Burlingame, and Kelly were there" (R., p. 80).

> "Sunday evening at the mission house[1] witness was appealing to the good side of his nature; asked him several times to tell witness the truth about this thing; finally said to him, 'If you are guilty and your brother is innocent, now is the time to tell it; I want to know'; then it was he admitted seeing all three men killed; his brother was then in a cell in the back part of the building; witness started the conversation first; defendant was so reticent that witness asked K. S. Wang to talk to defendant, and he did so in Chinese; witness told Wang, 'You are

(1) Should be "station house." See R., p. 89, 102, etc.

one of his countrymen, now you talk to him, and see if you can get him to tell anything about this crime.' Witness made the statement to defendant about his brother before Wan [Wang] talked to him in Chinese; made it in the presence of Wang and defendant" (R., p. 80).

And again Inspector Grant says:

"Witness went to station house Sunday night with K. S. Wang about 6 or 7 o'clock for the purpose of still talking to him about the case; 'I wanted to straighten out a great many circumstances which pointed to him' " (R., p. 89).

And again:

"When witness first started to talk with defendant on that occasion, K. S. Wang was present; it was on that occasion that witness told defendant, 'If you are guilty, and your brother is innocent, I want to know, for I am holding your brother, just the same as I am holding you' " (R., p. 90).

"The Sunday night previous to this Monday, K. S. Wang talked to the defendant; the purpose of having K. S. Wang talk to him was because he was a friend of his and a Chinese, the same type of Chinaman that he was, and we thought there was a chance for him to tell K. S. Wang what he probably would not tell us; made no suggestions to Wang except told him the circumstances of the case and said to him, 'You can readily

> see from these things that he got a lot to explain, and I would like to hear what he has to say to you about those circumstances; that is incriminating circumstances,' and witness said, 'I wish you would go over the whole case with him from the time he brought his brother down here to the time he was arrested in New York, or brought here from New York'; K. S. Wang had been brought down from New York by Mr. Kelly on account of the fact that a telegram had been sent by Wang on his way from the West to defendant or his brother; thinks K. S. Wang was brought to town Thursday or Friday; witness suggested that he go to see defendant Sunday night; just before he went in and talked with defendant witness suggested that he go in and talk with him and he was allowed to sit in there with him alone" (R., p. 91).

All this evidence was in the record when petitioner's counsel asked petitioner to state what K. S. Wang said to him on that all-important occasion on Sunday evening. K. S. Wang was brought in by the police after they had failed to secure anything which the Government deems a confession. He was taken in to Wan by Grant and left to talk with him alone in Chinese with the injunction:

> "Now you talk to him, and see if you can get him to tell anything about this crime" (R., p. 80).

What Wang said to petitioner, Wan, the learned court's ruling deprives us of knowing, but we do know that just "before Wan (Wang) talked to him" (R., p. 80) Grant said to him:

> "If you are guilty and your brother is innocent, now is the time to tell it; I want to know" (R., p. 80).

Or, as Grant puts it, at another time: "If you are guilty, and your brother is innocent, I want to know, for I am holding your brother, just the same as I am holding you" (R., p. 90).

It does not require any great stretch of the imagination to conclude that in spite of the fact that Inspector Grant testifies he "made no suggestions to Wang except told him the circumstances of the case" (R., p. 91), Wang might have understood himself at liberty to convey some threat or promise to Wan, perhaps in regard to his brother's liberty, and might in fact have done so, and it is submitted that if he did so it was under circumstances which clothed him, so far as petitioner is concerned, with authority to make such threat or promise in the name of the authority which had arrested and held him in custody.

To exclude evidence of what Wang said to Wan in such circumstances upon the ground announced by the learned trial court, that there was nothing in the record "from which you can reason he (K. S. Wang) had any authority to represent the Government in this case" (R., p. 144), was prejudicial

error and we submit even standing alone would justify a reversal of the judgment.

In the Government's brief in the Court below, it is said that the exception saved on this point fails because:

> "* * * The record does not show what the witness would have said had he been permitted to continue. It can not be the duty of a trial court to admit hearsay testimony on the chance that it may be admissible under some exception to the rule. Suppose Grant had authorized Wang to offer Wan an inducement to confess. There was nothing in the offer to go into the conversation to show that Wang actually held out to Wan any inducement." (Brief for Appellee, p. 55.)

It is respectfully submitted that there is nothing of substance in this objection to the form in which the exception was taken. The only matter of substance is that the trial judge shall have been fairly advised that petitioner's counsel intended to show a threat or a promise by someone for whom the police were responsible. Mr. O'Shea, petitioner's counsel, distinctly told the court "that we believe that if K. S. Wang made certain inducements or suggestions to this man as a result of which this man made a statement, that that is proper" (R., p. 144). What more could he have said? Was it necessary for Mr. O'Shea to repeat this statement when he said "we make the offer to go into this con-

versation" a few lines further down in the record? The court thoroughly understood the general purport of the evidence which petitioner desired to educe and the court excluded it on the ground that "there is nothing from which you can reason he (K. S. Wang) had any authority to represent the Government" (R., p. 144). On this point it is submitted that the learned court was in error. It is submitted therefore that the exception was properly saved.

But conceding for the sake of the argument that the form in which the offer was made is somewhat inartistic and might be open to technical objection in a civil case, it is nevertheless earnestly submitted that in a vitally important crisis in a capital case this honorable tribunal will not disregard an exception because an offer of testimony does not in terms "show what the witness would have said" when counsel has just finished telling the court what the witness would have said. That this honorable tribunal will consider an offer and exception in general terms in a criminal case is apparent from its decisions in the following cases:

Wiborg v. United States, 1896, 163 U. S. 632. The defendants were convicted of violation of the neutrality laws. This court said:

> "No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly

saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it" (p. 658).

To the same effect is *Clyatt v. United States,* 1904, 197 U. S., 207, at 221, where the Wiborg case is cited and followed.

Crawford v. United States, 1909, 212 U. S., 183, at 193-194:

Conviction on an indictment for conspiracy to defraud the United States. Counsel for the defendant challenged a juror because he was "a salaried officer of the government." Challenge was overruled and the defendant accepted. The court held:

"* * * that the objection actually made reaches beyond the mere question whether technically the juror was or was not a salaried officer of the Government, and that it reaches the question of the qualification of a juror by reason of his relations to the Government as a post office clerk or employee * * *" (p. 193-4).

"In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made, as in civil cases. They will, in the exercise of a

sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception. *Wiborg v. United States,* 163 U. S., 632, 659" (p. 194).

Weems v. United States, 1909, 217 U. S., 347, at 362:

Defendant was convicted in the Philippines for falsifying "a public and official document." The third and fourth assignments of error were to the effect respectively that the record did not show that the plaintiff in error was present when tried and that the punishment was "cruel and unusual." The court said in the course of its opinion:

> "It is admitted, as we have seen, that the questions presented by the third and fourth assignments of error were not made in the courts below, but a consideration of them is invoked under Rule 35, which provides that this court, 'at its option, may notice a plain error not assigned.'
>
> "* * * As we have already said, the rule is not a rigid one, and we have less reluctance to disregard prior examples in criminal cases than in civil cases, and less reluctance to act under it when rights are asserted which are of such high character as to find expression and sanction in the Constitution or bill of rights. And such rights are asserted in this case."

The court accordingly reversed the conviction.

In the Weems case Constitutional rights under the 8th amendment were asserted and vindicated. In the present case Constitutional rights are asserted under the 5th amendment.

III. Petitioner's Statements Being Confessions and Not Voluntary Were Therefore Inadmissible.

It follows irresistibly from the authorities that if the petitioner's statements were confessions and were not voluntary they are inadmissible:

> "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort" (Mr. Chief Justice Fuller in *Wilson v. United States,* 162 U. S., 613, at 623, quoted with approval in *Bram v. United States,* 168 U. S., 532, at 548).

The learned Court of Appeals says in the course of its opinion:

> "The crucial test to be applied in determining whether or not a confession is voluntarily or involuntarily made, depends upon its truth or falsity. As was said by the court in *Commonwealth v. Dillon,* 4 Dall., 115, 117: 'If such declarations are voluntarily made, all the world will agree, that they furnish the strongest evidence of imputed guilt. The hope of mercy actuates almost every criminal who confesses his crime; and merely that he cherishes the hope, is no reason, in morality, nor in law, to disbelieve him. The true

point for consideration, therefore, is whether the prisoner has falsely declared himself guilty of a capital offense? If there is ground even to suspect, that he has done so, God forbid, that his life should be the sacrifice!'

"Applying this rule, the present confession accords with every reasonable theory of guilt. All the circumstances in the case corroborate it. Therefore, its admissibility, as competent evidence for the consideration of the jury, is supported by every principle of law" (R., pp. 185-6).

It is submitted with all deference that this amounts to changing accepted law by judicial definition. This Honorable Court holds that a confession is admissible if voluntary. The learned Court of Appeals, on the other hand, holds that a confession is voluntary if it is true, and therefore admissible if it is true, and proceeds to apply that rule to the instant case by saying that the admissibility of petitioner's confession is "supported by every principle of law" because "all the circumstances in the case corroborate it" (R., p. 185).

It is possible that this conception of the law arises from a misapprehension of the authority quoted, *Commonwealth v. Gillan* (4 Dall., U. S., 116, at 117). An examination of that case discloses that the passage quoted by the learned Court of Appeals is from the charge of the Court to the jury commenting upon the confession which the Court

had already held to be admissible, under circumstances which would certainly now secure its exclusion in almost all jurisdictions. As addressed to the jury, which had the confession before them, the admonition that "the true point for consideration, therefore, is, whether the prisoner has falsely declared himself guilty of a capital offense" was, of course, correct; but as applied by the learned Court of Appeals to the question of admissibility it amounts to striking down the accepted law of confessions and substituting therefor the novel proposition that the admissibility of a confession is determined by the Court's opinion of its truth or falsity.

(1) *The Confession Not Corroborated.*

There is one aspect, however, in which the language of the learned Court of Appeals may be thought to require further consideration. It is said: "All the circumstances in the case corroborate it" (the confession). This passage may be intended to refer to the doctrine of the admissibility of a confession by virtue of a confirmation by subsequently discovered facts. The cases where stolen property has been recovered as the result of confessions are the best known illustrations of this doctrine. This doctrine, which has many refinements, goes into such questions as to whether merely the facts of the discovery may be shown or that part of the confession directly relating to the discovery,

etc., etc. It is submitted that it is unnecessary to discuss this doctrine in the present case for the simple reason that there were no material facts discovered as the result of petitioner's confession. It is submitted that the petitioner in his confession told the police officers nothing which has been proved to be true which they did not already know and had not already told him except the ultimate fact (which the jury must have found to be true) that petitioner killed Ben Sen Wu. Not only is the confession not confirmed as to any material fact subsequently discovered to be true, but on the contrary it is contradicted by a host of more or less material facts, some of which were known or might have been known to the police officers who took the confession even at that time.

For example:

1. In the confession, the petitioner, Wan, says he came to Washington on Friday, January 24, 1919 (R., p. 108). But Mrs. Gertrude Bartels, his landlady, testifying for the Government, says he left her house in New York on Wednesday, January 22 (R., p. 25).

2. In the confession, Wan says he sent the second telegram to his brother, Van, "after 5 or 6 o'clock," Tuesday, January 28 (R., p. 110), at Wu's suggestion. But the Government proved through Florence Waters that this telegram was filed with the Western Union Telegraph Co., at 2.16 p. m., January 28 (R., p. 36), which tends to

support Wan's testimony at the trial (R., p. 136) that he sent the second telegram because he was very sick and thought perhaps his brother did not receive the first one.

3. In the confession Wan says that Wu told him he was going out to dinner Wednesday night, January 29th (R., p. 110), and "would be home as soon as he finished his dinner party" (R., p. 110), but the Government's witness King Chu testified that he "had no previous engagement to have dinner with Wu that evening; it just came up after class that night when they left the school" (R., p. 121), and that "witness and Wu went to the Oriental Cafe at Pennsylvania Avenue near 14th street and had dinner with two other friends; had no previous arrangements at all; met Mr. U. Shang Ly there and later Mr. Jeffers joined them" (R., p. 120). It is submitted that Wan learned of this "party" not from Wu but from the police. Major Pullman testified for the Government that he told Wan on Saturday evening when he was first brought to Washington that "Mr. Wu had dinner with U. Shang Ly, Howard Jeffers and King Chu on Wednesday" (R., p. 92).

4. In his confession, Wan says (R., p. 111) that Wu telephoned him while he was at the Mission between 7 and 8 o'clock on Wednesday, the 29th, the evening on which the murders were supposed to have been committed. But Mr. King Chu, a Government witness, who went to dinner with Wu that

night about 6 o'clock and left the restaurant with him "a little before 8 o'clock" (R., p. 120), and saw him take a Mt. Pleasant street car at 14th and F streets, says nothing whatever of Wu's telephoning anyone while they were together. The same is true of Mr. Harry A. Jeffers, another Government witness present at the dinner (R., p. 36). Mr. U. Shang Ly, the other person present, was not called.

5. According to the confession, Wu told Wan on Tuesday, January 28, that he had taken the check out of the book, and, on Wednesday, that Dr. Wong had discovered that it was missing, had blamed Wu, and had called up the police (R., p. 110). But the Government utterly failed to corroborate this by showing by the police that they had been notified, and it is therefore reasonable to presume that they had not been so notified.

Moreover, if the police had in fact been notified of the theft of the blank check they would doubtless have notified the bank, and when Van presented the envelope containing the check on January 30th explanations would have been in order before he was permitted to leave the bank. Instead the bank merely declined to pay the check because of lack of identification (R., p. 45), and only notified the police that the check had been presented two days later, Saturday, February 1st, after the murders had been discovered (R., p. 83).

6. In the confession Wan says he wrote the check in the kitchen with a "fountain pen" which

Wu took "from his pocket" and which he thinks belonged to Mr. Hsie (R., p. 112), but while Officer Evans testified for the Government that he "took two fountain pens off Mr. Hsie's body" (R., p. 51) there is no evidence showing a fountain pen on Mr. Wu's body or in his clothes in his room.

7. According to the confession Wu fired one or two shots "at Mr. Hsie's back" (R., p. 113), then Hsie "partly ran" (R., p. 113) to the furnace room. With Wu behind him, and "about one" shot followed (R., p. 113), presumably at Hsie's back. The coroner, Dr. Nevitt, for the Government, testified that Hsie had a "gunshot wound in the head *in front* where the bullet was found, no other wounds and no powder marks on the body" (R., p. 57, italics supplied).

8. In the confession Wan says that Wu fired at Dr. Wong when the latter entered the kitchen—he thinks one shot (R., p. 115). Wong turned and rushed upstairs. "Wu followed him upstairs and struggled with him" (R., p. 115). Wan who remained in the kitchen thinks he heard two or three shots. At the trial Inspector Grant for the Government testified that blood was found "on the stairs leading up from the kitchen" as well as upstairs "where Dr. Wong lay" (R., p. 86). Major Pullman testified for the Government that the detectives told Wan "about the glasses at the bottom of the staircase; that Dr. Wong's body had been found upstairs on the reception hall floor, indicating that he must have been shot and he had strug-

gled upstairs; that things were in a topsy-turvy condition in the little central room, lamp shade turned over, and so on; is not sure the glasses are Dr. Wong's glasses; * * *" (R., p. 96). Coroner Nevitt testified that Wong's body showed "two gunshot wounds, one through the heart about the third rib, and the other a little below the fourth rib, which is the axilla; the point of entrance of one was through the heart, and the other, the axilla; one bullet was found lodged in the right lung and the other almost down diagonally across the body to the seventh rib in the tissue of the muscular tissue over the lung" (R., p. 57). Further the Coroner testified to a cut on Dr. Wong's right forehead and about two inches long, numerous abraisions on the top of the head and forehead and back of the head, and on the back of his right hand and wrist; also a large contusion or bruise on the right chest (R., p. 57). It is submitted that these physical facts are gravely inconsistent with the confession in at least the following respects:

(a) In spite of the desperate struggle which according to the confession must have taken place between Wong and Wu no wounds were reported by the Coroner on Wu's body except the two bullet wounds (R., p. 57), which according to the confession were later inflicted by Wan. Moreover Kang Li testified for the Government that he found Wu's room, where apparently, according to Wan's confession (R., p. 116), [illegible] changed his clothes immediately after killing Hsie and Wa[illegible], in

an "orderly condition" (R., p. 48), with a book open at a chapter on Government or Constitution (R., p. 48).

(b) Either the shot fired at Wong when he entered the kitchen took effect or it did not. If it did not take effect the blood on the stairs remains unaccounted for by the confession. If it did take effect it could not have been the shot in the heart which "would be fatal" (R., p. 57), but must have been the shot which entered at the axilla and passed "almost down diagonally across the body to the seventh rib" (R., p. 57). Even after having received this wound it is submitted that it is highly improbable that Dr. Wong could have retained strength to go upstairs and engage in the struggle described in the confession and receive all the injuries described by the Coroner. Moreover, why should a man with a loaded pistol following a desperately wounded man have occasion to engage in such a struggle as is indicated by the physical facts?

The confession is, however, entirely consistent with the theory that petitioner was endeavoring as best he could to give back to the police the theory of the killing of Wong which Major Pullman had already explained to him (R., p. 96) and making mistakes in the attempt.

9. In the confession Wan says in telling of the killing of Wu, "I put the gun right against his body and shot again" (R., p. 117), but in Coroner Nevitt's testimony for the Government nothing is

said of powder marks on Wu's body and no point of exit for the bullet is noted (R., p. 57).

10. According to the confession, Hsie returned to the Mission house about 10:30 p. m. (R., p. 112) and was killed at once. Dr. Wong came in about ten or twenty minutes later (R., p. 114), and entered the kitchen "not over ten minutes" later (R., p. 114) and was killed. Wu must have been killed shortly thereafter, although the exact time is not stated. Dr. Wong and Mr. Hsie had left the Chinese dinner-party about 10 p. m. (testimony of U. C. Yang and Lingoh Wang for the Government (R., p. 37). Wu finished dining a little before 8 p. m. (Testimony of King Chu, for the Government, R., p. 120). Nevertheless, the Coroner at the autopsy of Dr. Wong's body "noticed no evidence of food" (R., p. 58). As to Hsie's body, the Coroner could not tell "whether there was evidence of food in the stomach." There was nothing said on this point in the case of Wu.

11. In the confession, Wan says that after having washed his hands he went upstairs and went out by the front door (R., p. 118). Inspector Grant testifies that there were blood marks on the outside of the cellar door leading from the furnace room to the street near the knob. It "appeared to us (the detectives) that the man had opened the door with his left hand and put his right hand, which was probably bloody, on the outside of the door" (R., p. 86). The murderer apparently left with bloody hands and by the cellar door.

The foregoing list by no means attempts to exhaust the specific inconsistencies between the confession and the physical facts as disclosed elsewhere in the record. It simply attempts to point out some of the inconsistencies which can be brought out in brief compass and without resorting to any particular argumentation or inference.

(2) *"A Suggested Confession."*

It is submitted that when the petitioner made his confession he simply gave back to the police the information he had received from them. He did not need to know anything which they had not told him. Fortunately the evidence in the record in support of this point is abundant and conclusive.

Major Pullman testifies that on Saturday night at the mission house, witness

> "showed him [Wan] the entrance hall of the building, reception hall, where Dr. Wong's body had been found; had the boys light up the entire house, took him to the basement, showed him where the bullets hit the wall, where the bodies had lain, the condition of the table, and so on; were in the furnace room, should say, twenty-five or thirty minutes; not much conversation there; he asked a number of questions which we answered to the best of our ability" (R., p. 93).

Again, on cross-examination, referring to the same Saturday night, Major Pullman says:

"He (Wan) wanted to see where everything had been done and asked a number of questions; thinks the pictures were shown to him" (R., p. 96).

Again,

"Defendant asked about position of the bodies in the basement" (R., p. 96).

Inspector Grant says, referring to the same occasion:

"On reaching the mission house, took the defendant over the whole scene; showed him some bullet holes in the kitchen in the wall" (R., p. 85).

"Showed him the precise spot where the bodies were found, and upstairs showed him where Dr. Wong lay, and the blood there, and the blood on the stairs leading up from the kitchen; told him evidently Dr. Wong had been shot on the stairs, because his handkerchief was found at the foot of the stairs and his glasses; does not know yet whether or not they were Dr. Wong's glasses" (R., p. 86).

"Witness pointed out to defendant where Dr. Wong's body had been discovered, and how he was found, told him his face was all bloody and swollen beyond recognition" (R., p. 86).

"We would show him bullet holes in the walls, the blood, told him about the water being hot, everything of that kind; told him

> practically everything there was; went through the history of the thing; asked him what he thought about it all" (R., p. 86).

And finally, Inspector Grant says, that on this occasion:

> "After the foregoing, we went over the whole case with Wan from the time he left the mission house, his being found in New York, in bed, writing a telegram of condolence, covered the entire thing, how the bodies were found, the wounds on the body, the check; went over practically each and every circumstance in the case for the purpose of seeing if he would tell us anything about any part of the case that would enlighten us as to who committed the crime" (R., p. 88).

Again, referring to his conversation with Wan, when accompanied by K. S. Wang, Sunday evening, at Police Station No. 10, Inspector Grant testified that he

> "went over practically and rehashed all the case as far as they had learned about it and related all the circumstances against him; told him a lot of things," etc. (R., p. 81).

Further, witness

> "thinks Wu's pistol was shown defendant Sunday night in No. 10 station house; thinks that was the first time showed him the blood on the pistol" (R., p. 89).

Lieutenant Burlingame, on cross-examination,

> "being asked if he had ever made any suggestions to the defendant during those four or five days as to how this triple murder took place, said, 'Well, that is rather hard to answer in that way, Mr. O'Shea'; the triple murder was talked over and discussed in almost every way imaginable; defendant asked the officers a number of times to describe just how the dead bodies were found, where each body was found, during that week at the hotel," etc. (R., pp. 63-64).
> "cannot say witness made suggestions to him, only that the murder was discussed" (R., p. 64).

Again, in describing what happened at the mission house Saturday night, Lieutenant Burlingame said:

> "somebody said to defendant if he wanted to see where these three men were found would show him, so he was taken over the house and walked around, and he asked a great many questions: 'Who laid there?' There was the spot where Dr. Wong's body lay; quite a spot of blood; he asked who was found there and whose blood, something to that effect; he was taken down in the basement and shown the position of the other bodies; he asked about the revolver, where it was found, and they told him; then he went through the house in a general way" (R., p. 66).

Again, referring to Saturday night,

> "then we started around the house and stopped at the dark spot where Dr. Wong was found; this had already been described to the defendant and when he came to the house he was familiar with that, and where the other bodies were found; that night he stopped there and asked some questions, asked how mony times he had been shot, about the coat, and then went down stairs, and practically the same thing was repeated down there; * * * he asked some questions about how the lamp had got broken in the back room, does not recall whether they were answered, and asked questions where the bodies were found in the basement, where the revolver was found, and then witness left them," etc. (R., p. 73).

Again, Burlingame says:

> "he (defendant) expressed a desire to see everything, and he asked questions about everything about the place during the week" (R., p. 77).

Again,

> "From a remark that defendant made on Saturday night in the mission house witness judges he had been shown all the pictures; it was a remark in answer to a question about having seen the pictures, to indicate the position of something" (R., p. 77).

Coming to Monday morning, at the mission house, Lieutenant Burlingame says:

"Witness showed him the bloody handkerchief in the house on Monday evening so he could tell the story better, and where each of the incidents took place" (R., p. 75).

Again,

"Witness had the handkerchief in his pocket and showed it to him [Wan] at the kitchen table (this handkerchief had the name 'Wong' written on it in ink). Defendant asked witness where he found it, and witness indicated the step near the foot of the stairway leading from the kitchen upstairs, and defendant said he thought it was the same handkerchief Dr. Wong had in his hand that night when —— shot him and he ran upstairs; witness recalls defendant saying something about having seen a picture of where the bodies of Wu and Hsie had been found" (R., p. 77).

"Witness thinks it likely defendant was shown the pistol" (R., p. 77).

Again,

"Witness recalls on Monday at the mission house defendant said something about having seen a picture of where the bodies of Wu and Hsie had been found; was not shown the pictures by witness; probably in the house that day a couple of hours (R., pp. 75-76).

In view of the foregoing, it is perfectly obvious that the petitioner was supplied with all the material for making the confession which the police

finally extracted from him, and that his attempts in his confession to follow the facts and theories which had been drilled into him by the police afford not the slightest corroboration of the verity of the confession, but, in fact, are the best evidence that the petitioner simply attempted to give back to the police what they had already told him.

It is perhaps worth while to support this general proposition by comparing some of the more important statements in the confession and their obvious sources as shown in the testimony of the police officers. If there is any one thing which stands out in the foregoing excerpts in the record it is that the petitioner had drilled into him the precise places where the bodies were found, both by being shown the exact locations in the house and by being shown pictures taken while the bodies were still there. Accordingly, it is no surprise to find that in the confession petitioner was careful to have the three men killed on the precise spots where he knew they had been found, and in order to do this he tells a story which, were it not so grewsome, would be humorous.

He has Wu shoot at Hsie in the kitchen, but has Hsie "partly run" (R., p. 113) into the furnace room, a trap, instead of attempting to escape upstairs, in order that he may die on the precise spot shown in the photograph; and, likewise, in the confession he inveigles Wu out of the kitchen and into the furnace room to look at the furnace, and kills him after he has minded the fire and starts to re-

turn to the kitchen, in order that, in his case, too, the prophecy of the photograph might be fulfilled.

It is respectfully submitted that there is nothing at all in the physical facts to show that Wu and Hsie were really killed where they were found. But they were found there and petitioner was informed that they were found there, and, in his confession, he has them killed there in conformity with his information.

Again, take the case of Dr. Wong. The police theory was that Dr. Wong was shot on the stairs and rushed upstairs and was killed upstairs, because his handkerchief and someone's glasses were found at the foot of the stairs and somebody's blood was found on the stairs. This theory, which as above indicated is in view of the nature of Dr. Wong's wounds highly improbable to say the least, was of course adopted in the confession. Even the details of what the police told petitioner are reproduced. Thus Major Pullman told Wan, as above quoted:

> "Dr. Wong's body had been found upstairs on the reception hall floor, indicating that he must have been shot and he had struggled upstairs"; (R., p. 96).

Petitioner, in his confession, echoes this fact:

> "Wu followed him upstairs and struggled with him" (R., p. 115).

Major Pullman proceeds:

> "things were in a topsy-turvy condition in the little central room, lamp shade turned over, and so on;" (R., p. 96).

Petitioner's confession echoes:

> "I heard chair fall and glass break" (R., p. 115).

Nothing was left to petitioner's imagination when he came to make his confession.

But even after petitioner had been held *incommunicado* by the police without any formal charge against him from Saturday, February 1st, until Sunday, February 9th, when he was charged with murder and had been repeatedly and almost constantly during waking hours examined with respect to the circumstances of the crime; even after he had been taken to the house of murder on Saturday night and had all the circumstances known to the police rehearsed, rehashed and re-enacted by the police again and again on the very scene of the crime between 7 o'clock at night and 5.30 the next morning; even after he had been charged with the murder Sunday morning and on Sunday evening under the further examination of Inspector Grant in company with K. S. Wang, a Chinese, had confessed to being present when the men were killed by a Chinese named Chen; even after he had been taken back to the mission house Monday and had had a dress rehearsal, so to speak, of his confession

with Lieut. Burlingame on the very scene of the crime; still when he came to make the formal written confession on Tuesday morning it was not made in the form of an unaided, connected statement which might carry on its face the impression of a man telling a story with which he is familiar. It was made in response to leading questions by Lieut. Burlingame. As Burlingame testifies:

> "* * * Witness asked him to tell the story in his own way, and defendant said, 'No, you ask questions, I answer it better.' Witness asked him questions based on the story he had told the day previous, and that was put down in the statement, which was then taken down in Station No. 10, Tuesday morning, February 11th," etc. (R., p. 70).

A glance at the written confession which is found in the record at pages 108-120, will show the leading character of Burlingame's questions, and the brief or indefinite character of most of petitioner's answers. The following passage taken from the record at the top of page 109 is typical:

> Burlingame: Now, did Mr. Wu make a proposition to you about getting some of the mission money—about getting a check?
>
> Wan: When I was at the mission.
>
> Burlingame: And what did he say?
>
> [Fol. 100] Wan: He just said I could get some money. He figured like that way.
>
> Burlingame: He said he wanted to get some of the mission money?
>
> Wan: Yes.

Burlingame: And how did he say he was going to get it—by check? Did he say get one of the mission checks?

Wan: Yes.

Burlingame: And who did he say would go to the bank and cash it?

Wan: That time he didn't say.

Burlingame: After you rented a room at the Harris Hotel did you send a telegram to your brother? Did you ask him to meet you here in Washington?

Wan: Yes.

Burlingame: Did he come?

Wan: No. (R., p. 109).

Instead of petitioner making an intelligent, connected confession bearing upon its face the marks of verity, Lieut. Burlingame was confessing for the petitioner through the medium of leading questions and securing petitioner's assent in monosyllabic answers.

It is respectfully submitted that the general situation under which petitioner made his so-called confession, aside from the specific inducements or threats held out to him and which are elsewhere discussed, is aptly described by petitioner in the following passage of his cross-examination at the trial by District Attorney Laskey in which he characterized the confession as a "suggested confession:"

"* * * On Sunday night at the station they wanted Chen in it, and witness put him in, and on Monday at the mission they told

witness there was no Chen in it, so witness did not put Chen in it. On Monday morning at the mission house said that witness' friend, Wu, killed Hsie and Dr. Wong, because was forced by police, and Mr. Grant had told witness at the Dewey Hotel that Wu had bad character in Washington, which witness doubted; witness was locked in jail and did not know anything, but maybe it is true and maybe the detectives telling lies; at the same time, Dr. Wong and Mr. Hsie were killed, and witness think maybe there was something wrong with Wu, as witness had not been in Washington. Witness did not think Mr. Wu killed Dr. Wong and Mr. Hsie; Inspector Burlingame thought so; I did not think so, yet I have signed this confession, though * * * I was forced myself, I could not say; if he wants me to put anybody, if he wants me to put something else, I was willing to do that.

[Fol. 145] "Q. Why did you put Chen in then?

"A. They say, the detectives, 'There is no Chen in it;' if they say 'Is Chen in it,' then I say 'Chen in it,' I have to do what detectives want me to do.* * *

"Q. Why, they first charged you with having killed all three of the men, didn't they?

"A. Yes.

"Q. Why didn't you admit that then?

"A. At first he charged me three and at first he asked me the killing; at first he asked me the check and I denied that because at that time my physical condition was not so bad, and later on, gradually and gradually

they had me in the hotel and they questioned me more than eight days and finally I could not stand this condition, and moreover I got more information from them (?) and I know very well about this case even if I did not do it, and they ask me the story and ask you if you knew it; surely I know it. I know the story from the detectives.' It a suggested confession."

Thereupon the following occurred:

"'Q. It is a suggested confession, is it?
"'A. Yes.
"'Q. Not a compulsory one. They did not force you to sign it, but they made a suggestion and you followed it. Is that right?
"'A. Yes.'" (R., pp. 156, 157.)

It is interesting to compare the above excerpt from the record in the instant case with the following which is extracted from the record in *People v. Brockett, supra,* and reproduced by the Supreme Court of Michigan in its opinion holding the confession in that case inadmissible:

"Q. What did you tell them?
"A. I told them just the way they told me. * * * They told it to me several times over so I understood it, and I up and told it to them the same way they told it to me. * * * I just followed the statements as they made it to me. * * * Mr. Carroll said I would get out of it if I told the truth about it, and he wouldn't listen to me tell what was really true, so I had to tell what he wanted me to.

* * * I offered to tell the truth when I first started, but they wouldn't listen to the truth, so I thought the easiest way to get out of it, I was willing to do it. * * * They told me I would get clear if I told the truth, and I tried to tell the truth when I first started, but they wouldn't listen to it; they said it was no such thing as that at all. They tried to tell me that I was telling a lie when I was trying to tell the truth. * * * I was rattled up; I don't hardly know which one was talking; they were both talking all the time together. * * * They drilled me for a day and a half before they ever had me say what I did. They had been drilling at me telling me all about this and asked me questions if I did it, telling me how it was done and all about it. Then of course I knew how it was done; I could get up and tell it. * * *

"Q. Didn't he tell you he wanted you to tell the truth?

"A. Yes, but he wanted me to tell it so that I did it, and I thought the best way, if I could get out of it, I would tell it that way." * * * (*People v. Brockett,* 195 Mich. 169).

IV. The Admission of Petitioner's Confession was Highly Prejudicial.

The Government's brief in the Court of Appeals concludes as follows:

"Before closing our discussion, we cannot refrain from adverting to the fact that, aside from the confessions, the testimony appear-

> ing in the record, abbreviated and stated in narrative form, demonstrates appellant's guilt beyond a reasonable doubt" (Brief for appellee, p. 55).

It is possible that the Government will repeat this contention in this Court. However often repeated, we meet it with a two-fold answer. First, we respectfully but emphatically deny that the evidence aside from the confession could justify or support a verdict of guilty. Second, we submit as a matter of law, that the Government's contention in such regard is irrelevant, and has been so held by courts of the highest respectability—this because the verdict of the jury was based upon all the evidence including the confession and nothing appears to indicate how much or how little credence was given to latter.

In a recent Michigan case, heretofore referred to, *People v. Brocket* (1917), 195 Michigan 169, the State put forward this same contention, viz., that the admission of defendant's confession was not prejudicial since there was enough evidence *aliunde* to warrant a conviction. The Supreme Court of Michigan, in reversing the case, disposed of such contention as follows:

> "It is said on behalf of the people that there was sufficient evidence to warrant a conviction of the defendant without the confession. Without conceding that this is true (for it appears to us that the case was a close one upon the facts), yet it should be said

that the fact that evidence other than the alleged confession was sufficient to justify a conviction did not make the admission of the confession, improperly extorted, harmless, as it cannot be said what weight the jury gave to the confession in reaching their verdict" (*People v. Brockett,* 195 Michigan, 179).

The same point arose in a recent California case, *People v. Loper,* (1910), 159 California, 6, where, in reversing a conviction for murder on account of the improper admission of a confession, the Court said:

"It is suggested that the evidence in this case was so complete without the confession of the defendant that the jury would have found him guilty even if the confession had been entirely omitted. While this argument serves to emphasize the lack of excuse for the resort on the part of public officers to the methods of the 'third degree,' it does not abate one whit the defendant's right to all of his constitutional privileges.

* * * * * * *

"* * * * To say that the confession of the following morning was not inuenced by the conduct and the conversation of the officers, would be to contradict all human experience. And it is equally untenable to say that because the prosecution had a perfect case without the confession, the jury would have imposed the ultimate penalty of the law upon the de-

fendant, whether that confession had been excluded or admitted. No one could say (not even the jurors themselves) just what weight the confession had in fixing the belief of the jury in Loper's guilt, and especially in shaping a verdict involving capital punishment. But every one must conclude that the introduction of the defendant's own statement of his guilt under the circumstances here shown, must have been most highly prejudicial to him. It follows that for this reason a new trial must be ordered" (*People v. Loper,* 159 California, 20-21).

V. *Petitioner's Confessions Being Involuntary as a Matter of Law it Was Error for the Trial Court to Submit Them to the Consideration of the Jury.*

The learned Court of Appeals says in its opinion:

> "The testimony of defendant was in the nature of a general denial of the evidence given by the officers and witnesses on behalf of the Government, especially as to defendant's alleged treatment by the officers, which he claims induced him to confess. This, however, presented a well-defined issue of fact as to whether or not the confession was voluntarily made, and, like all other issues of fact, was one for the consideration of the jury" (R., p. 183).

But it is submitted that the statements which the police officers themselves testified that they made

to petitioner, and which, of course, the petitioner did not deny, rendered the confessions involuntary as a matter of law. True, the Government's witnesses repeatedly testified in terms that they made no threats and offered no inducements. As Inspector Grant put it, he "never offered any inducements because witness has had too much experience in that line" (R., p. 81). But it is submitted that this statement becomes merely the statement of an incorrect conclusion of law when placed in juxtaposition to the physical facts of the prisoner's custody, as testified to by Government witnesses, and with the specific statements which Inspector Grant and the other officers testified they made. "If you are guilty and your brother is innocent, now is the time to tell it; I want to know" (R., p. 80); "told him that things looked pretty black for him" (R., p. 80); "If you are guilty and your brother is innocent, I want to know, for I am holding your brother, just the same as I am holding you" (R., p. 90). "Q. And this was what you meant by saying that you appealed to the better side of his nature—by telling him that the investigation looked awfully black and that he had better tell you the truth? A. Yes; I thought if he told the truth about it, it would be the proper thing for him to do under the circumstances" (R., p. 81). * * * "Q. Your purpose in telling him those things was to make him talk? A. My purpose was to get him to tell me the truth about this case. Q. Answer the question, will you? A. Well, he had to talk" (R., p. 90).

No statement as to the treatment which the petitioner received or as to the threats or inducements which were made to him has been relied upon in this brief, except the uncontradicted statements of the Government's own witnesses. And it is respectfully submitted that if upon the Government's own showing petitioner's confessions were inadmissible as a matter of law they could not have become admissible by the fact that petitioner and his brother testified to other facts and statements, which, if established, would have made them still more inadmissible, if inadmissibility can be said to be a matter of degree.

In *West v. United States* (1902), 20 Appeals, D. C., 347, the Court of Appeals of the District of Columbia stated the question of law involved as follows:

> "The only question in the case is whether the alleged confession of the appellant was voluntary or involuntary in contemplation of law; and whether this should have been determined by the court, or whether under the circumstances it was properly left to the jury for its determination" (p. 351).

The court held that the evidence should have been excluded and reversed the case. The portion of the opinion dealing with the latter part of the question involved, namely, whether or not it was proper to submit to the determination of the jury whether the confession was voluntary or involuntary, is dis-

posed of by the learned court in its opinion as follows:

"In the case of *Wilson v. United States*, 162 U. S., 613, it was held that 'when there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant;' and it is argued from this that it was proper here to submit the question to the jury as it was actually submitted. But there was here no conflict of testimony. It is true that the appellant, as a witness on his own behalf at the trial, denied that he had made the confession testified to by the police officers; and that in this regard there was contrariety of testimony. But there is no contradiction by him of the words of inducement used by the officers; and those words being such as, under the decision in the Bram case, were sufficient to render the confession involuntary in law, there was nothing to be passed upon by a jury. If there had been controversy whether such words were used, the prisoner affirming and the officers denying such use, then a case might have been presented for the consideration of the jury under the ruling in the case of *Wilson v. United States.*

"Under the authority of the case of *Bram v. United States,* it must be held that there was error in the admission in evidence of the alleged confession claimed to have been

made by the appellant, as well as in the submission of the question to the jury whether the confession was voluntary or involuntary" (p. 352).

VI. *The Justice Who Presided at the Trial Having Died Pending Settlement of a Bill of Exceptions, No Other Justice or Judge Was Competent to Settle Same.*

Section 953 of the Revised Statutes of the United States, as amended by Act of June 5, 1900, ch. 717, Sec. 1 (31 Stats. L., 270; Comp. Stats. 1918, Sec. 1590), is inapplicable to cases tried in the Supreme Court of the District of Columbia.

Mr. Justice Gould, who presided at the trial of this case, died after petitioner's bill of exceptions had been duly submitted for settlement, but before his action thereon could be had (R., 179). Conceiving the situation thus created to be governed by the provisions of Section 73 of the Code of Law of the District of Columbia (which in all substantial phrasing is but a re-enactment of Section 803 of the Revised Statutes of the District of Columbia), in conjunction with applicable provisions of Rule 48 of the Rules of Practice of the Supreme Court of the District of Columbia, counsel for petitioner Wan moved to vacate the judgment, set aside the verdict and grant a new trial, upon several grounds specified, the principal one of which, and the only

one to be argued under this assignment of error was that

> "The death of the said trial justice left no one with power or authority to settle the bill of exceptions" (R., 10, 175).

Such principle was sustained by this Court in *Hume vs. Bowie,* 148 U. S., 245, wherein a similar situation had arisen and had been brought under review with reference to the provisions of Section 803 of the Revised Statutes of the District of Columbia in conjunction with Rule 64 of the then existing Rules of Practice, which did not materially differ in terms from the present Rule No. 48, above referred to.

But Mr. Chief Justice McCoy, then holding a criminal term of the Supreme Court of the District of Columbia, being of opinion that the provisions of Sec. 953, of the Revised Statutes of the United States as amended, governed and controlled the situation in the circumstances, was satisfied that he could allow a true bill of exceptions. The Chief Justice arrived at this conclusion because among other things where there was a difference among counsel "as to exhibits" a comparison of these exhibits was made by the court (Mr. Chief Justice McCoy, who had not sat at the trial and had no judicial knowledge of the occurrences at the trial) and this comparison of the exhibits, is relied upon to sustain the ruling of the court who thus constituted himself a thirteenth juror. Accord-

ingly Chief Justice McCoy overruled the objections of counsel timously made as above set forth, and first having noted appropriate exceptions upon his minutes, signed the bill of exceptions which appears in the record at pages 21 to 181, thereof.

Such action of the learned Chief Justice was fully upheld by the learned Court of Appeals, and was disposed of in its opinion by the observation that

> (R., 186, par. 2.) "This exception is fully disposed of in *Roney v. United States*, 43 App. D. C., 533, where it was held that Sec. 953 R. S., as amended by Act of Congress of June 5th, 1900 (31 Stats. L., 270), providing that in the case of the death of the presiding judge, any judge of the same court may settle and sign a bill of exceptions, applies to the District of Columbia. The law on this point, therefore, may be regarded as settled by the Roney case."

With great respect, we venture to think that neither such pronouncement of the learned Court of Appeals nor its declarations contained in the case specifically cited, correctly settles the law of the District of Columbia applicable to the settlement of bills of exceptions in the circumstances of the instant case. As the question is one of power and, therefore, of general importance, we venture to stress the point in the instant case in order that a contention which has agitated judicial and professional circles in the District of Columbia since

before the rendition of the opinion of the Court of Appeals in the Roney case may be finally put at rest.

This contention has arisen from and is rested upon the legislative history attending the provisions of Section 953 of the Revised Statutes of the United States and the amendment thereto and of Section 73 of the Code of Law for the District of Columbia, both of which are directly concerned with the claimed right to exercise the power in question on the one hand and the denial of the existence of the power and right so claimed on the other.

It is said by this honorable Court, speaking through Mr. Justice Matthews, in *Metropolitan Railroad Company vs. Moore,* 121 U. S., 558, at page 571:

> "But the Act of March 3d, 1863, 'To Reorganize Courts of the District of Columbia and for other purposes (12 Stats., 762), was the introduction into the District of Columbia of a new organization of its judicial system. It established a single court, to be called the Supreme Court of the District of Columbia, having general jurisdiction in law and equity. * * * It also gave to each of the justices of the court power to hold a District Court of the United States for the District of Columbia, with all the powers and jurisdiction of other District Courts of the United States; and also to hold a criminal court for the trial of all crimes and offenses arising within the District,

> with the same powers and jurisdiction as was then possessed and exercised by the Criminal Court of the District of Columbia. * * * The arrangement of that court, for the purposes of convenience and despatch of business, into general and special terms, was taken from the system long previously established and known in the State of New York in reference to its Supreme Court; and, for the purpose of determining the relation of the special to the general term, the Act of Congress of March 3, 1863, adopted the provisions from the legislation of New York incorporated into the sections of the Revised Statutes now under consideration."
>
> (Including, among others, Section 803, to be hereinafter specifically referred to.)

Section 6 of said Act of March 3d, 1863, authorized said Supreme Court of the District of Columbia to:

> "Establish such other rules as it may deem necessary for regulation of the practice of the several courts organized by this Act, and from time to time revise and alter such rules."

Section 7 provided:

> "That all issues of fact triable by a jury or by the court shall be tried before a single justice." * * *

Section 8 provided:

> "That if, upon trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be marked on the minutes of the justice, *and afterwards settled in such manner as may be provided by the rules of the court,* and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed." (Italics supplied.)

By Act of Congress of June 1st, 1872 (17 Stats. L. 196, 197), "To further the administration of Justice", which referred in terms to "any suit or proceeding in the circuit courts of the United States," it was provided by Section 4 thereof:

> "That a bill of exceptions hereafter allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto."

It would seem to be quite plain that although the above quoted provisions from the two Statutes pertained in general to the same subject matter, they differed in matters of particular and consequently, *prima facie,* at least, were applicable only within their respective indicated fields of operation.

Thus, with respect to the subject-matter under inquiry, the law remained without change or comment necessary to be noted here until June 22, 1874, on which day the Congress of the United States enacted two great but separate bodies of statuary law, the one commonly called the Revised Statutes of the United States, technically entitled "An Act to Revise and Consolidate the Statutes of the United States in force on the First Day of December, Anno Domini, One Thousand Eight Hundred and Seventy-three," and the other commonly referred to and called Revised Statutes of the United States relating to the District of Columbia, technically entitled "An Act to Revise and Consolidate the statutes of the United States, general and permanent in their nature, relating to the District of Columbia, in force on the first day of December in the Year of Our Lord One Thousand Eight Hundred and Seventy-three."

In the first of these great compilations, namely, the Revised Statutes of the United States, there appeared the following:

> "Sec. 953. A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated, if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto."

It is very plain that this constitutes but a restatement of Section 4 of the Act of June 1st, 1872, above referred to.

In the second of the above compilations, namely, the Revised Statutes of the United States relating to the District of Columbia, there appeared the following:

> "Sec. 801. All issues of fact triable by a jury or by the Court, shall be tried before a single justice.
>
> "Sec. 803. If, upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice *and afterwards settled in such manner as may be provided by the rules of the court,* and then stated in writing in a case or bill of exceptions of so much of the evidence as may be material, but such case or bill of exceptions need not be sealed or signed." (Italics supplied.)

It is equally evident that these sections constitute but a restatement of similar provisions of the Act of March 3d, 1863, above referred to. It is also equally evident that though pertaining to a like subject-matter, to that covered by Section 953, Revised Statutes of the United States, their respective provisions differ from each other in material aspects and were intended, as according to all generally accepted rules of construction they must now be held to have been intended, to apply to and to control within their own respective juris-

dictional spheres, neither one encroaching or to be permitted to encroach upon the field occupied by the other.

Again, as found by this Court in *Hume v. Bowie*, 148 U. S., 245 (which case was decided March 20th, 1893), then having the above Section 803 of the R. S. D. C. under consideration, the particular rule of practice of the Supreme Court of the District of Columbia to be considered in practical operation in connection with said Section 803 was the old rule 64 which reads:

> "64. In case the judge is unable to settle the bill of exceptions and counsel cannot settle it by agreement, a new trial shall be granted."

and the court indicated that said Section 803, in conjunction with said Rule 64 of the Rules of Practice of the Supreme Court of said District, prescribed and determined that

> "Where the party, without laches on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted."

In reaching its conclusions as declared in *Hume v. Bowie, Supra,* the Court did not refer to Section 953 of the Revised Statutes of the United States and none had the temerity to suggest that it in anywise bore upon the matter then under inquiry.

Thus the matter rested until the October Term,

1899, of this honorable Court, when there was brought before it for decision the case of *Malony v. Adsit,* on appeal from the District Court of the United States for the District of Alaska (175 U. S. 281), in which this Court, speaking through Mr. Justice Shiras, first citing and quoting Section 953 of the Revised Statutes, remarked (p. 285):

> "We understand this enactment to mean that no bill of exceptions can be deemed sufficiently authenticated unless signed by the judge who sat at the trial, or by the presiding judge if more than one sat,"

and after citing and reviewing numerous cases, said: (p. 286).

> "Those cases were cited with approval by this court in *Hume v. Bowie,* 148 U. S., 245, where it was held that where the judge presiding at the trial of a cause in the Supreme Court of the District of Columbia at circuit dies without having settled a bill of exceptions, it is in order for a motion to be made to set aside the verdict and order a new trial, and that, where such an order is made by the court in general term, it is not a final judgment from which an appeal may be taken to this court. It is true that there is a rule of the Supreme Court of the District of Columbia which provides that in case the judge is unable to settle the bill of exceptions and counsel cannot settle it by agreement a *new trial shall be granted, and that this court regarded that rule as apply-*

> *ing to the case in hand, and that hence a new trial was a matter of course.*" (Italics supplied.)

It is interesting, with reference to the specific circumstances attending the instant case, to note that Mr. Justice Shiras, at the outset of the court's opinion, in *Malony v. Adsit, supra,* states:

> (p. 284.) "An inspection of this record discloses that the bill of exceptions was not settled, allowed and signed by the judge who tried the case, but by his successor in office, several months after the trial. It is settled that allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial. What took place at the trial, and is a proper subject of exception, can only be judicially known by the judge who has acted in that capacity. Such knowledge cannot be brought to a judge who did not participate in the trial or to a judge who has succeeded to a judge who did, by what purports to be a bill of exceptions, but which has not been signed and allowed by the trial judge."

Though prescribed in differing terms through separate statutes the one effective and operating within the territorial limits of the District of Columbia alone, the other operating and controlling the practice in all courts of the United States elsewhere than in the District of Columbia, this court held that the same result followed in all cases and within both spheres of territorial statutory influ-

ence, namely, that a bill of exceptions to be legal and be given operative effect must be settled and signed by the very judge who sat at the trial.

Such result in the courts of the District of Columbia flowed from and was compelled by the provisions of Section 803 of the Revised Statutes relating to the District of Columbia. Elsewhere in the courts of the United States it flowed from and was compelled by the provisions of Section 953 of the Revised Statutes of the United States. The provisions of neither statute, while covering the same subject matter in general, namely the settlement of bills of exception where the judge who presided at the trial had died without settling same, encroached upon the territorial sphere of operation of the other.

Section 953 of the Revised Statutes of the United States, though in general terms possibly broad enough to include the District of Columbia, had no force of application therein because of the specific application there of the provisions of Section 803 of the Revised Statutes of the District of Columbia, which differed from Section 953 in affording room in the operation of the judicial mechanism for play of such rules affecting the subject matter, namely settling bills of exception as the Supreme Court of the District of Columbia from time to time might prescribe.

In this state of the affair, by "An Act Relating to the Allowance of Exceptions," approved June 5, 1900 (31 Stats. L., 270; Ch. 717), the Congress

enacted That section nine hundred and fifty-three of the Revised Statutes be so amended as to read as follows:

"Chap. 717. An Act Relating to the Allowance of Exceptions.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section nine hundred and fifty-three of the Revised Statutes be so amended as to read as follows:

"Sec. 953. That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenograhpic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion

and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he can not fairly pass upon said motion, and allow and sign said bill of exceptions, then he may, in his discretion, grant a new trial to the party moving therefor.

"Sec. 2. That this act shall apply to all causes now pending, and to all causes pending for hearing upon motion for new trials, and to all causes pending for the allowance of a bill of exceptions."

The purpose of the enactment as expressed in its preamble, was solely to amend Section 953, Revised Statutes, U. S. Nothing whatever is said with respect to the wholly separate and specially operating provisions of Section 803 of the Revised Statutes Relating to the District of Columbia.

If prior to the amendment, Section 953, R. S., U. S., had no application in the Courts of the District of Columbia, by what magic can an amendment thereof by added adjective matter, without altering or in any manner widening its previous sphere or field of operation, be assumed or construed to effect the repeal of the corresponding but separate enactment, viz. 803, Revised Statutes, D. C., specifically confined in operation to narrowly

defined territory. Had the Congress which is conclusively presumed to have acquaintance with its own legislative enactments and the respective fields each was intended to fill and control, intended to destroy by repeal or otherwise the vitality in whole or in part of Section 803, Revised Statutes, D. C., it could readily and should aptly have so indicated. So far from giving any such indication it has furnished full and unquestionable proof by its own later enactments that it neither cherished nor harbored any such purpose or intention.

By its "Act to establish a code of law for the District of Columbia" which was approved March 3, 1901,—that is approximately but ten (10) months after the enactment amending Section 953, R. S., U. S., and which became effective January 1st, 1902, the Congress re-enacted Section 803, R. S., D. C., as section 73 of the Code of Law for the District of Columbia, in the precise form and words in which it had theretofore existed. The particular rule of court then and since in force, is Rule 48, Sec. 3, which reads

> "Rule 48, Sec. 3. If the court is unable to settle the bill of exceptions, a new trial shall be granted."

and corresponds to Rule 64 quoted in *Hume v. Bowie,* 148 U. S. 245, 249, which reads

> "64. In case the judge is unable to settle the bill of exceptions, and counsel cannot settle it by agreement a new trial shall be granted."

Death of a trial judge would seem to effect an inability beyond all hope of repair.

In the light of such legislative and judicial history combined, can it reasonably be suggested that Section 953, R. S., U. S., as amended by the Act of June 5th, 1900, *supra,* has application to cases adjudicated in the Supreme Court of the District of Columbia?

If, as this Court authoritatively and conclusively adjudged and declared in *Hume v. Bowie, supra,* a new trial must be awarded in the circumstances existing in both that and the existing case because of Section 803, D. C., in conjunction with former Rule 64, how can it be that the identical statutory provisions labeled as Section 73, Code, D. C., in conjunction with the later and applicable Rule 48, permit of a different result?

The General Provisions of 953, U. S., as amended, broad and seemingly all embracing as same may appear to be, by generally accepted rules of statutory construction and application, must yield to the provisions of the specially applicable law. The general must yield to the special.

Nor can it be thought that such result is either defeated or deflected by the provisions of Section 1639 of the Code, D. C., which reads

> "Sec. 1639. The enactment of this Code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; and all acts of Congress that may be

> *passed hereafter* are to have full effect as if passed after the enactment of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith." (Italics supplied.)

With respect to this it will at once be noted that the amendment of 953, Revised Statutes of the United States effected June 5, 1900, *supra,* was not effected "between the date of this act (*i. e.*, March 3, 1901) and the date when this act is to go into effect" *i. e.*, January 1, 1902; nor does such amendment constitute an act "passed *hereafter,* that is subsequent to March 3, 1901, and consequently is not to be considered nor given effect as "subsequent" statute nor "as repealing any portion of this act (i.e. the Code D. C.) inconsistent therewith."

In the light of what has gone before it is respectfully submitted that Section 953, Revised Statutes of the United States as amended June 5, 1900, is not and was not intended by the Congress to constitute general legislation applicable to the District of Columbia, and that is inconsistent with the provisions of Section 73 of the Code, D. C., a later enacted statute; that if the first suggestion be wrong then in so far at least as inconsistent Section 953 must yield to the restrictions expressed in the later and more narrowly applicable law. In either case no

foundation is afforded to support the conclusions expressed by the learned Court of Appeals, D. C., in *Roney v. U. S.*, 43 App. D. C. 533, at pages 537, 538 cited at page 186 of the record in the case at bar.

With submission we venture to think that the principles declared in *Johnson vs. United States*, 38 App. D. C., 347, as somewhat narrowed and affirmed by this Court on certiorari in *Johnson vs. United States*, 225 U. S., 405, are not adverse to the position of counsel as above taken and argued. In the last cited case, counsel for the United States took much the same position as that apparently assumed in the instant case by the learned Court of Appeals, with respect to apparently conflicting or overlapping provisions of the Code, D. C., and the Criminal Code approved March 4, 1909 (31 Stats., 1088, c. 321).

In disposing of the contention, this Court, speaking through Mr. Justice McKenna, said:

> (P. 417.) "We think, however, that there are certain general considerations which control. The codes are separate instruments, and no certain test can be deduced from pointing out particular likenesses or differences. But the effect of separation is important and necessarily had its purpose. The codes had in the main special spheres of operation and provisions accommodated to such spheres. There is certainly nothing anomalous in punishing the crime of murder differently in different jurisdictions. It

is but the application of legislation to conditions. But if it be anomalous, very little argument can be drawn from it to solve the questions in controversy. The difference existed for a number of years between the District and other places under national jurisdiction, for, as we have seen, the qualified verdict has not existed in the District since the enactment of the District Code, and did not exist when the Criminal Code was enacted. There is certainly nothing in the mere act of enacting that code which declares an intention to give to the provision conferring power on a jury to qualify their verdict greater efficacy against the code of the District than the same provision in the Act of January 15, 1897, possessed. And the difference between that act and the District Code we cannot assume was overlooked and all that it meant in the administration of criminal justice when Congress came to review the laws of the country for the purpose of their codification and necessarily the territorial extent of their operation.

"Congress certainly in enacting the District Code, recognized the expediency of separate provisions for the District of Columbia. It was said at the bar and not denied that the District Code was not only the work of the lawyers of the District, having in mind the needs of the District, but of its citizens as well, expressed through various organizations and bodies of them. In yielding to the recommendations Congress made no new precedent. It had given local control to the Territories, and it enacted a separate code for Alaska.

"But it is said that Congress recognized the incompleteness of the District Code, and provided that all inconsistent acts of Congress passed thereafter should be held to modify its provisions, and to support this Sec. 1639 is cited. That section provides, as follows:

" 'The enactment of this code is not to affect or repeal any Act of Congress which may be passed between the date of this Act and the date when this Act is to go into effect; and all Acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment of this code, and, so far as such Acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this Act inconsistent therewith.'

"In connection with this section, Section 341 of the Criminal Code is referred to, which is as follows:

" 'Also all other sections and parts of sections of the Revised Statutes and Acts and parts of Acts of Congress, in so far as embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed.'

"This section adds no force or explanation to section 1639. Of course, what was 'embraced within and superseded by' the Criminal Code is repealed by it. But we have to consider, as we have considered,

whether the provision of the District Code in regard to the punishment of murder were embraced within the Criminal Code, and the discussion answers as well the contention based on Section 1639. There is no inconsistency of superseding or repealing effect between the Code of the District and the Criminal Code, regarding the latter as an Act of Congress passed after the District Code. Having definite territorial operation, they can exist together. And, as said by the Court of Appeals, a cogent reason for the conclusion that they were intended to exist together is found in the repealing provisions of the Criminal Code, which, in Chapter 15, enumerates in detail the provisions repealed, and no reference is made to the District Code."

Motion of defendant's counsel to vacate judgment, set aside the verdict and grant a new trial, because of inability to legally settle a bill of exceptions for use on appeal, having been improperly denied, the judgment of the Court of Appeals, based upon approval of such denial, should be reversed, and the case remanded, with instructions for further proceedings to be had in the Supreme Court of the District of Columbia in accord with law.

VII. *The Learned Court of Appeals Erred in Holding That Petitioner Was Presumably Indebted to Wu at the Time of His Death.*

The learned Court of Appeals says in its opinion:

> "On the question of motive, evidence of the financial condition of defendant at and prior to the time of the homicide was admitted over the objection and exception of defendant. Those transactions had direct relation to the Mission. Two checks he had received from Wu—one on the 27th, the day he left the Mission. He was presumably indebted to Wu at the time of the homicide. * * *" (R., p. 186).

It is respectfully submitted that, as a matter of law, no presumption of indebtedness on the part of petitioner to Wu arises because Wu had given the petitioner his two checks. On the contrary, it is respectfully submitted that the presumption is that these checks were given for value received.

Johnson v. Wright (1894), 2 D. C. App. 216. "A negotiable check" * * * "imports consideration" (p. 219).

Towles v. Tanner (1903), 21 D. C. App. 530. "It has been the general law, both in England and America, for 200 years" * * * "that every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value" (p. 543).

VIII. *This Court Has a Right in a Capital Case to Notice the Following Prejudicial Errors to Which no Formal Exceptions Were Taken:*

(1) *The examination of the petitioner by the learned trial court was prejudicial error.*

We wish respectfully to draw the court's attention to the examination of the defendant by the trial judge in the Supreme Court appearing at pages 151 to 155 of the record. We do this with the utmost respect for the learned judge who presided at the trial, who not only had the highest reputation as a just and able judge, but who was recognized as peculiarly gifted in presiding fairly at criminal trials. This was probably the last important criminal trial at which Mr. Justice Gould presided. He died before the bill of exceptions could be settled and the bill of exceptions in this case was signed by the Chief Justice of the Supreme Court of the District of Columbia. But with all our respect for the memory of the justice who presided at the trial we believe that his examination of the petitioner, which became in substance a cross-examination, went beyond the limits which judicial discretion has fixed for an examination of a defendant in a capital case by the trial court, and was highly prejudicial to petitioner.

We bring this matter to the attention of the tribunal without argument fully realizing that no exception was saved to this examination. We do

respectfully dissent, however, from the view expressed by the learned Court of Appeals that counsel had expressly waived any exception. We submit that there was an unfortunate misunderstanding on this point and that counsel merely meant to insist that *all* the questions "without exception" (R., 155) (*i. e.*, ommitting none) should go to the jury instead of two of the questions being stricken out. However, as above stated, we concede that exception was not preserved of record and that in bringing this matter to the attention of the tribunal we must rely entirely upon the right of this court in its discretion in a capital case to notice prejudicial error, even although no exception has been expressly reserved.

(2) *The instructions of the learned trial court involved prejudicial error in charging the jury in substance that if the jury found the written confession to be voluntary then the petitioner was guilty.*

This is another point to which no exception is reserved, but which we venture respectfully to bring to the attention of this court, this being a capital case, in view of the following expressions in the opinion of the learned Court of Appeals:

> "A single exception was reserved by counsel for defendant to the instructions as given by the court, and this was directed to an unimportant and unobjectionable point.

> Its total lack of merit seems to have been appreciated by counsel, since it is not discussed in his brief. However, considerable space has been devoted in the brief of counsel in pointing out what is regarded as objectionable features in the instructions. The general rule is that where exception is not taken at the proper time, the court will refuse to consider objections raised for the first time on appeal. Owing, however, to the gravity of the judgment, we have carefully reviewed the charge of the court, and find it to be not only without error but so expressed that no safeguard which the law throws around a person accused of crime, for the protection of his rights, was in this instance omitted." (R., p. 187.)

Reference is also made in this connection to the holding of this honorable tribunal in *Wiborg v. United States,* 163 U. S., 632 at 659, and the other cases cited in II (*c*) hereof, to the effect that courts will "in the exercise of sound discretion sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception."

In the course of the charge of the learned trial court to the jury the following passage occurs:

> "In this case, both by the nature of the testimony and by the argument of counsel, it has resolved itself into two parts—I won't say distinct, because they are dependent, interdependent. The first is, Is the defendant proven to be guilty by the circumstances

which have been introduced by the Government; and the second is, Is his confession to be taken against him under the rules of law which I will state to you, which, of course, without contradiction, I suppose, on the part of counsel, if it is admitted, will show that he was guilty of this crime?" (R., p. 171).

It is respectfully submitted that this instruction amounts to telling the jury that if they conclude under the court's instructions that the confession was voluntary then they should find the defendant guilty, *i. e.*, they are precluded from disbelieving the confession, although the confession is at least in certain respects demonstrably untrue.

Assuming for the moment, and only for the purposes of the argument of this particular point, that the trial court properly submitted the petitioner's confession to the jury and gave proper instructions upon the question whether or not it was voluntary, it is still respectfully submitted that the jury was entitled to disbelieve the confession even if admissible and voluntary and that the foregoing instructions precluded them from so doing and was prejudicial error.

IX. *The Petitioner Asserts Constitutional Rights.*

Petitioner in this case asserts rights under the Constitution of the United States. This Court held in its comprehensive and enlightening opinion in the Bram case that the rule safeguarding confes-

sions in criminal cases had been expressly adopted and embodied in the fifth amendment to the Constitution of the United States, saying:

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself' " (168 U. S. at 542).

And again:

> "A brief consideration of the reasons which gave rise to the adoption of the Fifth Amendment, of the wrongs which it was intended to prevent and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted, and since expressed in the text writers and expounded by the adjudications, and hence that the statements on the subject by the next writers and adjudications but formulate the conceptions and commands of the Amendment itself. * * *" (168 U. S. at 543).

And finally:

> "* * * The well settled nature of the rule in England at the time of the adoption

of the Constitution and of the Fifth Amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of that Amendment. And the accuracy with which the doctrine as to confessions as now formulated embodies the rule existing at common law and embodied in the Fifth Amendment was noticed by this court in *Wilson v. United States, supra,* where, after referring to the criteria of hope and fear, speaking through Mr. Chief Justice Fuller, it was said: 'In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.' 162 U. S. 613, 623." (168 U. S. at 548).

The struggle for the maintenance of the correct balance and proportion between the rights of society and of the individual and for the protection of individual rights against the usurpation of power by the agents of society is never ending. Old abuses reappear in new forms and at once test and establish the soundness of the fundamental principles of Anglo-Saxon polity which have been written into our Federal and State Constitutions. The rack and the thumbscrew have given away to the "sweat box," the "third degree," "promises," "threats," and "importunate questioning" but the principles of our law and the articles of our Constitution abide, and the courts remain as the con-

stitutional instruments for the protection of the individual, and in so doing for the ultimate protection of society.

As was said in *Weeks v. United States* (1914), 232 U. S., 383, at 392:

> "* * * The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

Respectfully submitted,

FREDERIC D. McKENNEY,
WILLIAM CULLEN DENNIS,
JAMES A. O'SHEA,
CHARLES FAHY,
Attorneys for Petitioner.

JOHN W. DAVIS,
JAMES A. NOLAN,
Of Counsel.

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